TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 229.

THE OREGON SHORT LINE AND UTAH NORTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

FRANCIS CONLIN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

FILED APRIL 27, 1893.

(15,307.)

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1 & 2 At a regular term of the hon. the circuit court of the State of Oregon for the county of Wasco, begun and held in the court-house, in Dalles city, on the 2d day of February, 1892, at which were present the following officers:

Hon. W. L. Bradshaw, judge; D. L. Cates, sheriff; J. B. Crossen, clerk.

And the following proceedings *was* had on Wednesday, the — day of Feb'y, A. D. 1892, the same being the 10th judicial day of said term, to wit:

Order Changing Place of Trial.

FRANCIS CONLON
vs.
THE OREGON SHORT LINE AND UTAH NORTHERN RAILWAY COMPANY.

This cause coming on to be heard at this time on the motion of the defendant for a change of the place of trial and, after hearing the arguments of counsel, the court being fully advised in the premises, it is hereby considered, ordered, and adjudged that the said motion be allowed; that the place of trial of this cause be changed to Hillsboro, Washington county, Oregon, and that the cause be removed to the circuit court of the State of Oregon for Washington county, and that further proceedings in this cause be had in said court in like manner as if it had been commenced therein; and the clerk of this court is hereby required, within fifteen days from this date, to transmit a transcript of all proceedings heretofore had in this cause, together with all the original
3-10. papers filed herein, to the clerk of said circuit court of the State of Oregon for Washington county, and that the clerk of this court first make out and file in his own office authenticated copies of all such original papers.

(S'd) W. L. BRADSHAW, *Judge.*

Dated Feb'y 22d, 1892.

* * * * * * *

11 *Complaint.*

In the Circuit Court of Oregon for the County of Wasco.

FRANCIS CONLON, Plaintiff,
vs.
THE OREGON SHORT LINE AND UTAH NORTHERN R'Y CO., Defendants.

Now comes the above-named plaintiff and, complaining of the defendant, for a cause of action alleges—

That the defendant is and at all of the times hereinafter men-

tioned was a corporation duly existing and doing business in the State of Oregon.

That the defendant was during all of the times hereinafter mentioned and for a long time prior thereto and still is in the possession of and operating a line of railway from Portland, Oregon, to The Dalles, Oregon, and other points, generally known as the Oregon Railway & Navigation Company's line of railway, together with the rolling stock thereon.

That on or about the 2d day of February, 1890, the defendant employed the plaintiff at the Cascade Locks, in Wasco county, Oregon, to assist other men in its employ in clearing away a landslide upon its railroad track near the station of Bonneville, about three miles from the Cascade Locks, and agreed to transport him from said Cascade Locks to the location of said slide.

That on said day the plaintiff, under the direction of the defendant's proper officers and agents, got upon a train of cars then being operated by the defendant upon said road for the purpose of being transported to the location of said slide, where he was to be employed as aforesaid, and that on said day and while the defendant was transporting the plaintiff from said Cascade Locks to the
12 place where he was to be employed as aforesaid defendant negligently and carelessly permitted its said line of track between said places and the bridges thereon to become and remain out of repair and unsafe, and negligently and carelessly failed to properly inspect said line of track and bridges, and negligently and carelessly failed to keep proper watch and oversight over the same, and negligently and carelessly failed to ascertain and report the condition thereof, and especially of a certain bridge on the line of said road situated between the said Cascade Locks and Lower Cascades, Oregon, or Bonneville, over and across which the plaintiff was required to go to get to the place where the defendant required his services as aforesaid, and which said bridge the defendant negligently and carelessly permitted to become and remain out of repair and in an unsafe condition, and negligently and carelessly failed to keep proper watch and oversight over the same as aforesaid, and negligently and carelessly failed and omitted to ascertain the condition of the same and to report it to the officers in charge of the train upon which the plaintiff was being carried as aforesaid.

That while plaintiff was being carried across said bridge by the defendant in its cars as aforesaid, by reason of the defective and unsafe condition of said bridge and by reason of the failure of the dafendant to keep proper watch and oversight over the same and to ascertain and report the condition thereof to the officers in charge of said train upon which the plaintiff was riding and by reason of the negligence and carelessness of defendant's said officers in not keeping a proper lookout and in operating said train, the said bridge and the railroad track upon the same gave way, and the plaintiff was precipitated through the same, whereby he was
13 greatly bruised and injured, and whereby plaintiff was stunned and rendered unconscious, and whereby he was

drenched and submerged in the water of the stream running under said bridge and suffered great pain and bodily injury and was made sick and unable to work for a long time, and whereby his health has been greatly and permanently impaired for all time to come, and whereby the plaintiff will be permanently partially disabled from carrying on his usual avocation of a common laborer and will always suffer great bodily pain and anguish, all to his damage in the sum of $30,000.

Wherefore the plaintiff prays judgment for said sum of $30,000 and for his costs and disbursements made and expended herein.

A. S. BENNETT,
Attorney for Plaintiff.

14 STATE OF OREGON, } ss:
County of Wasco, }

I, Francis Conlon, being first duly sworn, say that I am the plaintiff above named, and that the foregoing complaint is true, as I verily believe.

FRANCIS CONLON.

Subscribed and sworn to before me this 1st day of October, 1890.

J. T. MULLEN,
[SEAL.] *Notary Public for Oregon.*

15 *Pet. in Removal to Circuit Court of U. S.*

In the Circuit Court of the County of Wasco, State of Oregon.

FRANCIS CONLON, Plaintiff, }
vs.
OREGON SHORT LINE AND UTAH NORTHERN R'Y CO., Defendant. }

To the honorable the circuit court of Oregon in and for the county of Wasco:

Your petitioner, The Oregon Short Line & Utah Northern Railway Company, respectfully shows that it is the defendant served in the above-entitled action; that this action is of a civil nature, and that the matter and amount in dispute exceeds, exclusive of interest and costs, the sum and value of $2,000.

That your petitioner is a corporation organized and existing and possessing certain corporate powers embraced in, depending upon, and provided for in two certain acts of Congress, hereinafter particularly set forth and mentioned, creating and organizing the Oregon Short Line Railway Company, a corporation in the Territories of Utah, Idaho, and Wyoming and creating and organizing the Utah Northern Railway Company, a corporation in the Territories of Utah, Idaho, and Montana; that your petitioner was so incorporated, organized, and created in the manner following, to wit: Long prior to the commencement of this action in the circuit court of the State of Oregon, county of Wasco, the Oregon Short Line Railway Company, a corporation mentioned in and organized and created by

an act of the Congress of the United States approved August 2nd, 1882, entitled "An act creating the Oregon Short Line Railway Company, a corporation in the Territories of Utah, Idaho, and Wyoming, and for other purposes," the Utah and Northern
16 Railway Company, a corporation mentioned in, organized, and created by an act of the Congress of the United States approved June 20, 1878, making and creating said company a railway corporation in the Territories of Utah, Idaho, and Montana and certain other railway corporations organized and created under the laws of the Territory of Utah, to wit, the Utah Central Railway Company, the Salt Lake and Western Railway Company, the Utah and Nevada Railway Company, and the Ogden and Syracuse Railway Company, and a railway corporation organized under the laws of the Territory of Wyoming, incorporated under the corporate name of the Idaho Central Railway Company, and a railway corporation organized under the laws of the State of Nevada, incorporated under the corporate name of the Nevada Pacific Railway Company, made and entered into certain articles of consolidation, whereby and under and pursuant to which a certain consolidated railway corporation was formed and created under and by the corporate name of the Oregon Short Line and Utah Northern Railway Company, which said consolidated corporation is your petitioner; that the consolidation aforesaid creating and organizing your petitioner was perfected under and pursuant to the laws of the Territory of Utah and Wyoming, of the State of Nevada, and of the laws of the United States in force on the first day of August, 1889; that your petitioner possesses all the corporate functions, powers, and authority possessed by the several constituent companies so entering into such consolidation, and your petitioner derives and depends for its existence and its authority upon certain of the acts and laws passed by the Congress of the United States, and particularly the two acts of Congress hereinbefore referred to, organizing two of the constituent companies forming and entering into such consolidation, to wit, the Oregon Short Line Railway Company and the Utah
17 and Northern Railway Company; that ever since such consolidation your petitioner has existed as a corporation under the corporate name aforesaid, exercised and assumed the corporate powers and functions of such corporation, and had and claims a corporate existence under and pursuant to and by virtue of the acts of the Congress of the United States, and particularly the acts hereinbefore mentioned.

Your petitioner further shows that this action arises under the Constitution and laws of the United States, and more particularly under the two acts of the Congress of the United States hereinbefore mentioned and specifically referred to, upon which the existence of your petitioner and its corporate functions and powers depend, and your petitioner has a defense to this action arising under the same.

Your petitioner further shows that the time to plead or answer in the above-entitled cause by your petitioner has not yet expired.

Your petitioner herewith offers a bond, with good and sufficient

sureties, for its entering in the circuit court of the United States for the district of Oregon on the first day of its next session a copy of the record in this suit and for paying all costs that may be awarded by said circuit court of the United States if said court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioner prays this court to proceed no further herein except to make the order of removal and to accept said sureties and bond and to cause the record herein to be removed into said circuit court of the United States in and for the district of Oregon.

And your petitioner will ever pray, etc.

THE OREGON SHORT LINE AND (UTAH) NORTHERN RAILWAY COMPANY,
By W. W. COTTON AND ZERA SNOW AND B. S. HUNTINGTON, *Its Attorneys.*

18 STATE OF OREGON, } ss:
County of Multnomah, }

I, Zera Snow, being duly sworn, do say that I am one of the attorneys of the petitioner in the above-entitled cause; that I have read the foregoing petition and know the contents thereof, and that the statements and allegations therein contained are true, as I verily believe.

ZERA SNOW.

Subscribed and sworn to before me this 6th day of October, 1890.
[SEAL.] F. S. LAFFERTY,
Notary Public for Oregon.

19 *Undertaking on Removal.*

In the Circuit Court of Wasco County, State of Oregon.

FRANCIS CONLON, Plaintiff,
v.
THE OREGON SHORT LINE & UTAH NORTHERN RAILWAY CO., Defendants.

Know all men by these presents that The Oregon Short Line and Utah Northern Railway Company, as principal, and Edward Cookingham and B. Campbell, as sureties, are held and firmly bound unto Francis Conlon and to all other persons whom it may concern in the penal sum of five hundred ($500.00) dollars; to the payment of which, well and truly to be made, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents.

The condition of this obligation is such that if the said Oregon Short Line and Utah Northern Railway Company shall enter and file on the first day of the next session of the circuit court of the United States in and for the district of Oregon copies of all process, pleadings, depositions, and testimony and other proceedings in a

certain suit or action now pending in the circuit court of the county of Wasco, State of Oregon, in which said Francis Conlon is plaintiff and the said Oregon Short Line & Utah Northern Railway Company is defendant, and shall do such other and appropriate acts that under and by the statutes of the United States are required in that behalf upon the removal of a suit from a State court
20 into said United States court, and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise to remain in full force and effect.

Witness our hands and seals this 6th day of October, eighteen hundred and ninety.

THE OREGON SHORT LINE AND UTAH NORTHERN RAILWAY COMPANY,
By E. McNEIL, *General Manager*. [SEAL.]
EDWARD COOKINGHAM. [SEAL.]
B. CAMPBELL. [SEAL.]

21 *Order on Pet. to Remove to Circuit Court of U. S.*

FRANCIS CONLON
vs.
OREGON SHORT LINE AND UTAH NORTHERN RAILWAY COMPANY.

Now, at this day, it appearing that heretofore, before the expiration of the time for answering the complaint the plaintiff filed herein, the defendant filed *his* petition in this cause to remove the same to the circuit court of the United States for the district of Oregon, upon the grounds set forth in said petition, and at the same time filed its bond on removal as by law provided, which bond is by the court, after examination, in all respects approved, now said petition for removal came on for hearing and, after hearing Mr. Zera Snow, for defendant, and Mr. A. S. Bennett, for the plaintiff, the petition is taken under advisement.

(S'd) E. D. SHATTUCK, *Judge*.

22 At a regular term of the hon. circuit court of the State of Oregon for the county of Wasco, begun and held in the court-house, in Dalles city, on the 10th day of Nov., 1890, at which were present the following officers:

Hon. E. D. Shattuck, judge; D. L. Cates, sheriff; J. B. Crossen, clerk.

And the following proceedings *was* had on Thursday, the 13 day of Nov., A. D. 1890, the same being the 4 judicial day of said term, to wit:

Or. of Wasco County Denying the Removal.

FRANCIS CONLON
v.
OREGON SHORT LINE AND UTAH NORTHERN RAILWAY COMPANY.

This cause having heretofore been taken under advisement by the court upon the petition of the defendant herein to remove this cause to the circuit court of the United States for the district of Oregon and for an order directing transfer of the same to said court:

Now, on this day, in consideration of the same, it is ordered that said petition be, and the same is hereby, denied; to which ruling of the court the defendant, by its counsel, in open court, excepts, the defendant, by its said counsel, protesting and objecting to any further proceedings herein in this court upon the ground that said cause is removable and has been removed to the said circuit court of the United States; which objections and protest are by the court now overruled, and it is ordered that the cause be retained in this court for further proceedings herein, the defendant, by its
23 counsel, objecting and protesting against further proceedings herein; and to the end that the defendant may be fully protected in whatever right it may have by virtue of its said petition and bond on removal, it is considered by the court that such further proceedings herein in this court as may be had in this cause are held over the objections and protest of the defendant, the defendant appearing herein only because of the order of the court retaining this cause for further proceedings herein; and thereupon there comes on for hearing a demurrer of the defendant to the plaintiff's complaint, and, the same being considered by the court, it is now by the court overruled, with leave to the defendant to answer the complaint by tomorrow morning.

(S'd) E. D. SHATTUCH, *Judge.*

STATE OF OREGON, } ss:
County of Wasco, }

I, J. B. Crossen, county clerk of the county of Wasco, State of Oregon, and *ex officio* clerk of the circuit court, do hereby certify that I have carefully compared the foregoing with the original journal entry as the same appears of record in my office and custody, and that it is a true and correct transcript therefrom and of the whole of said original.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 28th day of March, A. D. 1892.

[SEAL.] J. B. CROSSEN, *Clerk,*
By E. MARTIN, *Deputy.*

24 & 25 *Demurrer.*

In the Circuit Court for the State of Oregon in and for the County of Wasco.

FRANCIS CONLON, Plaintiff,
v.
THE OREGON SHORT LINE AND UTAH NORTHERN R'Y CO., Defendants.

Defendant demurs to plaintiff's complaint and for ground of demurrer shows that the complaint does not state facts sufficient to constitute a cause of action.

W. W. COTTON AND
ZERA SNOW AND
B. S. HUNTINGTON,
Attorneys for Defendant.

* * * * * * *

26 *Amended Answer.*

In the Circuit Court of the State of Oregon for the County of Wasco.

FRANCIS CONLON, Plaintiff,
v.
THE OREGON SHORT LINE & UTAH NORTHERN R'Y CO., Defendants.

Comes now the defendant and presents this its amended answer to the plaintiff's complaint and prays leave to file the same.

For an amended answer to said complaint denies upon its information and belief that on or about the 2nd of February, 1890, or at any other time the defendant employed the plaintiff at the place in the complaint alleged or elsewhere to assist other men in defendant's employ or otherwise in clearing away a landslide upon the railroad track in the complaint mentioned, near the station Bonneville, or elsewhere, or that defendant employed plaintiff for any purpose, or that plaintiff was in defendant's employ at all, but this defendant alleges that it is informed and believes, and upon such information and belief so charges the fact to be, that the plaintiff was not at the time of the alleged accident mentioned in the employ of the defendant, and this information has been obtained since the filing of defendant's original answer.

Defendant denies that at the time in the complaint mentioned or at any time the plaintiff, under the direction of the defendant's proper or any officers or agents, got upon a train of cars then operated by the defendant on said road for the purpose of being transported to the location of the said alleged or any slide, or for
27 the purpose of being transported to the location of said or any slide where plaintiff was to be employed, as alleged in

the complaint or otherwise, or for the purpose of engaging at any work for the defendant.

Denies that at the time in the complaint mentioned or at any time while the defendant was transporting the plaintiff from said Cascade Locks or elsewhere to the place where the plaintiff was to be employed or elsewhere, as alleged in the complaint or otherwise, the defendant negligently or carelessly or at all permitted its said line of track between the said places or between any places or the bridges or any bridge thereon to become or remain out of repair or unsafe, or that this defendant negligently or carelessly or otherwise failed to properly inspect its said line of track or bridges, or that in any manner it failed or neglected to inspect the same, or that it negligently or carelessly or otherwise failed to keep proper watch or oversight over the same, or that in — manner it failed or neglected to keep proper watch or oversight over the same, or that it negligently or carelessly failed to ascertain or report the condition thereof, or that this defendant negligently or carelessly failed to ascertain or report the condition of that certain bridge in the complaint referred to on said line of road situated and located as in the complaint alleged; denies that the defendant negligently or carelessly or at all permitted the said alleged bridge to become or remain out of repair or in an unsafe condition, or negligently or carelessly or otherwise or at all in any manner failed to keep proper watch or oversight over the same, or negligently or carelessly omitted to ascertain the condition of the same or report the condition thereof to the officers in charge of the train upon which the plaintiff was being carried.

28 Defendant denies that while plaintiff was being carried across the bridge in defendant's cars, as in the complaint alleged or otherwise, by reason of any defective or unsafe condition of the same brought about by any act or omission, negligently or otherwise, of this defendant, its officers, agents, servants, or employés, or by reason of any failure of the defendant to keep watch or oversight over the same, or to ascertain or report the condition thereof to the officers in charge of said train upon which plaintiff was riding, or by reason of any negligence or carelessness of defendant's officers or otherwise in not keeping a proper lookout or in operating said train, or by reason of any act or omission of the defendant, its officers, agents, servants, or employés or otherwise, said bridge or railroad track upon the same gave way, or that the plaintiff was precipitated through the same. As to whether or not the plaintiff, by reason of being precipitated through the said bridge or otherwise, was greatly or otherwise bruised or injured, or that thereby plaintiff was stunned or rendered unconscious, or that thereby plaintiff was drenched or submerged in the water of the stream running under said bridge, or suffered great or any pain or bodily injury, or was made sick or unable to work for a long time or any time, this defendant denies all knowledge or information sufficient to form a belief thereof, and as to the same this defendant has no knowledge or information sufficient to form a belief thereof; but this defendant denies that by reason of being precipitated through

the said or any bridge or the injuries alleged to have been received the health of the plaintiff has been greatly or permanently impaired for all time to come or permanently impaired at all, or that the plaintiff will be permanently or partially disabled from carrying on his usual avocation, or that plaintiff will always suffer great or any bodily pain or anguish.

This defendant denies that the plaintiff was precipitated through the said bridge whereby he was greatly bruised or injured, stunned, or rendered unconscious, or drenched or submerged in the water, or suffered great pain or bodily injury, or was made sick or unable to work, or whereby plaintiff's health has been greatly or permanently impaired, or whereby plaintiff will be permanently or partially disabled from carrying on his usual avocation of a common laborer or will always suffer great bodily pain or anguish, to the plaintiff's damage in the sum of thirty thousand dollars or to plaintiff's damage in any other sum whatever.

And this defendant denies that by reason of any of the acts complained of or injuries in the complaint alleged to have been received by the plaintiff or any act or injury complained of the plaintiff has been damaged in the sum of $30,000.00 or any other sum whatsoever.

This defendant, for a further and separate answer and defence, alleges that at the time of the alleged falling of the bridge in the complaint mentioned and the injury and damage by the plaintiff alleged to have been received, the plaintiff was riding upon the train in the complaint mentioned, which train was a work-train which had been sent out over the line of railroad in the complaint mentioned for the purpose of keeping open said line of railroad by repairing the same from time to time and place to place and keeping the same and the road-bed of said road free from accumulations and obstructions arising thereon from time to time without the cause or fault of this defendant and arising thereon by the elements and from cause beyond the defendant's control; that there were employés of the defendant engaged in the same line of service and performing similar duty to that by the plaintiff alleged by him as being engaged at by him, which work was the same work, hereinbefore mentioned, of keeping open this line of road and of removing obstructions therefrom as aforesaid and which work is the work by plaintiff referred to in his complaint and which work was and is of a hazardous character and dangerous, all of which the plaintiff well knew at the time of his going upon the train in the complaint mentioned; that at about the time in the complaint mentioned and while the defendant's employés were engaged in and performing and proceeding to engage in and perform the services and work hereinbefore mentioned, which was the service and work by them engaged for, said work-train, upon which the plaintiff was riding, was precipitated through one of the bridges upon its line of road, which bridge, unbeknown to the defendant and with no means of knowing by defendant, had been weakened just prior thereto by a freshet, arising without the fault and unbeknown to the defendant and with no means of knowing the same

by the defendant, and which accident occurred without the fault or negligence of any kind whatsoever of this defendant and by an accident not caused or in any manner contributed to by this defendant; that the accident so occurring was one of the risks of the employment assumed by employés of the defendant upon said train and for which, by the terms of the employment of defendant's employés engaged at such work, the defendant was not to become in any manner responsible; that plaintiff so negligently and carelessly proceeded, with other employés of the defendant so upon said train, to engage at work as aforesaid, and so negligently and carelessly conducted himself while proceeding to and while engaged
31–33 at the work by him alleged to have been engaged at, if he were so engaged at work, that he contributed to and aided in whatever he received, and if there were any other carelessness or negligence which caused or contributed to the accident and injury, either in the preparation of said work-train or in caring or watching over defendant's said road it was the carelessness and negligence of other employés of the defendant engaged upon said train and who were fellow-servants of the plaintiff, if the plaintiff was the servant by him alleged to have been at the time of said accident.

Wherefore this defendant, having fully answered, prays to be hence dismissed with the costs and disbursements.

W. W. COTTON,
ZERA SNOW,
B. S. HUNTINGTON,
Attorneys for Def't.

STATE OF OREGON,)
County of Wasco,) *ss:*

I, W. C. Allaway, being first duly sworn, depose and say that I am the agent of the defendant company above named. I believe the foregoing answer to be true. Defendant has no president, secretary, or other head of the corporation resident or now within the State of Oregon.

W. C. ALLAWAY.

Subscribed and sworn to before me this 14th day of February, 1891.

[SEAL.] B. S. HUNTINGTON,
Notary Public for Oregon.

* * * * * * *

34 At a regular term of the hon. the circuit court of the State of Oregon for the county of Wasco, begun and held in the court-house, in Dalles city, on the 11th day of Feb'y, 1892, at which were present the following officers:

Hon. W. L. Bradshaw, judge; D. L. Cates, sheriff; J. B. Crossen, clerk.

And the following proceedings *was* had on Thursday, the 11 day of Feb'y, A. D. 1892, the same being the 4th judicial day of said term, to wit:

Or. & Judgment of Supreme Court.

35 FRANCIS CONLON, Respondent, v. THE OREGON SHORT LINE & UTAH NORTHERN RAILWAY COMPANY, Appellant. } Appeal from Wasco County.

This cause having heretofore, to wit, on the 2d day of December, 1891, been argued and submitted and by the court then reserved for further consideration, and the court, having duly considered all the questions presented by the transcript herein and the arguments of the respective attorneys thereon and being now fully advised in the premises, finds that there is error as alleged—

It is therefore considered, ordered, and adjudged that the judgment of the court below from which this appeal was taken be, and the same is hereby, in all things reversed and set aside, and that appellant recover of respondent its costs and disbursements of the appeal, allowed and taxed at $287.24.

It is further ordered and adjudged that this cause be remanded to the said court below, and that a new trial be there had of the issues therein, and that a judgment be there entered and docketed in accordance herewith.

36–42 STATE OF OREGON, *County of Marion*, } ss:

I, J. J. Murphy, clerk of the supreme court of the State of Oregon, do hereby certify that the foregoing transcript has been by me compared with the original, and that it is a correct transcript therefrom and of the whole of said original as the same appears of record and in my office and custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Salem, Oregon, this 9th day of Feb'y, 1892.

[SUPREME COURT SEAL.] J. J. MURPHY, *Clerk.*

To the circuit court of the State of Oregon for the county of Wasco:

You are hereby commanded that of the above judgment order of the supreme court you cause proper entry to be made upon the record of your court as of a judgment therein and proceed to final determination and execution thereof as to the said order of our supreme court and to law and justice shall appertain.

In witness whereof I have hereunto set my hand and affixed the seal of the supreme court of the State of Oregon, at Salem, Oregon, this 9th day of Feb'y, 1892.

J. J. MURPHY,
[SEAL.] *Clerk of said Supreme Court.*

* * * * * * *

43–63 *Judgment Made and Entered.*

FRANCIS CONLON, Pl'ff.
v.
OREGON SHORT LINE & UTAH NORTHERN R'Y CO., Def'ts.

This cause being submitted to the court on a motion for a new trial filed by the defendant, the plaintiff appearing by S. B. Huston, *its* attorney, the defendant by Zera Snow, its attorney, *and* whereupon the same is now overruled; whereupon plaintiff, by counsel, moves for judgment upon the verdict; whereupon the defendant, by counsel, objects to any judgment herein upon the ground that this cause is removable to and, by its petition and bond heretofore filed, has been removed to the circuit court of the United States for the district of Oregon, and this court has not acquired jurisdiction herein; which objection is overruled, and it is now ordered, considered, and adjudged that plaintiff have and recover of and from the defendant the sum of twenty-two hundred and fifty dollars and the costs and disbursements of this action, taxed at $452.82 *dollars*.

And now, by consent of parties, it is ordered that twenty days be given to present and settle a bill of exceptions in the case, and that the same may be settled by the present judge of the court and signed as of this day.

(S'd) FRANK J. TAYLOR, *Judge*.

* * * * * * *

64 *Opinion Supreme Court, 2d Appeal.*

FRANCIS CONLON, Respondent,
v.
O. S. L. & U. N. R'Y CO., Appellant.

Appeal from Washington county. Frank J. Taylor, judge.

Alfred S. Bennett and S. B. Huston, for respondent; Zera Snow, for appellant.

Judgment affirmed.

LORD, *C. J.*:

This is an action to recover damages for personal injuries received by the plaintiff while in the service of the defendant. The injury was caused by the wreck of a work-train from the falling of a bridge over which the plaintiff was being carried on the line of the defendant's road. For a day or so prior to the accident there had been unusual storms, causing dirt and rock from the adjacent mountains to slide down upon the track and obstruct it at different places, so as to impede and finally to stop the passage of trains for several days. On the night before the accident the storm was accompanied by a heavy fall of warm rain, which, together with the melting snow, swelled the stream spanned by the bridge in question into a freshet. The officers in charge of the passenger train,

Or. & Judgment of Supreme Court.

35 FRANCIS CONLON, Respondent, v. THE OREGON SHORT LINE & UTAH NORTHERN RAILWAY COMPANY, Appellant. } Appeal from Wasco County.

This cause having heretofore, to wit, on the 2d day of December, 1891, been argued and submitted and by the court then reserved for further consideration, and the court, having duly considered all the questions presented by the transcript herein and the arguments of the respective attorneys thereon and being now fully advised in the premises, finds that there is error as alleged—

It is therefore considered, ordered, and adjudged that the judgment of the court below from which this appeal was taken be, and the same is hereby, in all things reversed and set aside, and that appellant recover of respondent its costs and disbursements of the appeal, allowed and taxed at $287.24.

It is further ordered and adjudged that this cause be remanded to the said court below, and that a new trial be there had of the issues therein, and that a judgment be there entered and docketed in accordance herewith.

36–42 STATE OF OREGON, *County of Marion*, } ss:

I, J. J. Murphy, clerk of the supreme court of the State of Oregon, do hereby certify that the foregoing transcript has been by me compared with the original, and that it is a correct transcript therefrom and of the whole of said original as the same appears of record and in my office and custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Salem, Oregon, this 9th day of Feb'y, 1892.

[SUPREME COURT SEAL.] J. J. MURPHY, *Clerk.*

To the circuit court of the State of Oregon for the county of Wasco:

You are hereby commanded that of the above judgment order of the supreme court you cause proper entry to be made upon the record of your court as of a judgment therein and proceed to final determination and execution thereof as to the said order of our supreme court and to law and justice shall appertain.

In witness whereof I have hereunto set my hand and affixed the seal of the supreme court of the State of Oregon, at Salem, Oregon, this 9th day of Feb'y, 1892.

J. J. MURPHY,
[SEAL.] *Clerk of said Supreme Court.*

* * * * * * * *

43–63 *Judgment Made and Entered.*

FRANCIS CONLON, Pl'ff,
v.
OREGON SHORT LINE & UTAH NORTHERN R'Y CO., Def'ts.

This cause being submitted to the court on a motion for a new trial filed by the defendant, the plaintiff appearing by S. B. Huston, *its* attorney, the defendant by Zera Snow, its attorney, *and* whereupon the same is now overruled; whereupon plaintiff, by counsel, moves for judgment upon the verdict; whereupon the defendant, by counsel, objects to any judgment herein upon the ground that this cause is removable to and, by its petition and bond heretofore filed, has been removed to the circuit court of the United States for the district of Oregon, and this court has not acquired jurisdiction herein; which objection is overruled, and it is now ordered, considered, and adjudged that plaintiff have and recover of and from the defendant the sum of twenty-two hundred and fifty dollars and the costs and disbursements of this action, taxed at $452.82 *dollars*.

And now, by consent of parties, it is ordered that twenty days be given to present and settle a bill of exceptions in the case, and that the same may be settled by the present judge of the court and signed as of this day.

(S'd) FRANK J. TAYLOR, *Judge*.

* * * * * * *

64 *Opinion Supreme Court, 2d Appeal.*

FRANCIS CONLON, Respondent,
v.
O. S. L. & U. N. R'Y CO., Appellant.

Appeal from Washington county. Frank J. Taylor, judge.

Alfred S. Bennett and S. B. Huston, for respondent; Zera Snow, for appellant.

Judgment affirmed.

LORD, *C. J.*:

This is an action to recover damages for personal injuries received by the plaintiff while in the service of the defendant. The injury was caused by the wreck of a work-train from the falling of a bridge over which the plaintiff was being carried on the line of the defendant's road. For a day or so prior to the accident there had been unusual storms, causing dirt and rock from the adjacent mountains to slide down upon the track and obstruct it at different places, so as to impede and finally to stop the passage of trains for several days. On the night before the accident the storm was accompanied by a heavy fall of warm rain, which, together with the melting snow, swelled the stream spanned by the bridge in question into a freshet. The officers in charge of the passenger train,

which had come down the night before the accident, found a slide below the bridge and, with the laborers accompanying that train, had undertaken to clear the slide, so that they might run the train through to Bonneville; but finding that they would be unable to clear the track of the slide that night, they backed the train up to Cascade Locks and side-tracked it, and during the night
65 the heavy fall of warm rain occurred which closed the road for traffic. The next morning the plaintiff was engaged by the defendant as a shoveler to aid in removing the dirt and other obstructions from the track and, in pursuance of orders, went on the work-train with other shovelers for the immediate purpose of being carried down to this slide below the bridge, which had been discovered the night previous, to help remove it from the track, and while being so carried over the bridge it gave way and precipitated the train, with the plaintiff and other laborers, some twenty feet into the creek below.

As to the cause of the bridge giving way, the evidence for the plaintiff tended to show that the foundation of the center bents had been gradually undermined by the action of the water in the creek for some time prior to the accident; that the bridge had settled and at different times had been wedged up, so that the bolts by which the stringers were fastened to the bents were drawn out of the bents, leaving nothing to hold them in place but the weight of the bents themselves. It also appears from the evidence that the defendant had but one track-walker on the eight-mile section of its road upon which this bridge stood, and that he had not been over this bridge for two days prior to the accident; that the defendant had sent out the train which was carrying the plaintiff over its road to the place where the slide below the bridge obstructed it without having previously sent any one over its road or made any investigation to ascertain its condition or the condition of its bridges. Substantially the state of facts involved in the case at bar has been before this court in the case of Knahtla *v.* R. R. Co., 21 Or., 156, and Carlson *v.* R. R. Co., *id.*, 450, and in this same case upon an appeal from a judgment rendered upon a verdict in favor of the plaintiff in Conlon *v.* R. R. Co., *id.*, 462, so that any further statement of
66 the facts in detail is unnecessary.

The defendant claims that under the facts as disclosed by the evidence it was not liable for the injury which the plaintiff sustained, because "the risk arising from the plaintiff's employment in assisting to remove the obstructions from the track was not increased by any act of omission or commission of the defendant," but the correctness of this proposition depends upon the fact whether the defendant was negligent in not using proper care before the storm to keep the bridge in repair or to ascertain the condition of the track or bridge after the storm, for if the injury which the plaintiff sustained was the result of an omission of the defendant to take proper precautionary measures, either before or after the storm, to lessen or avoid the liability to accident, it did not arise out of any risk which the plaintiff assumed as incident to his employment. For injuries occurring to other parties by the same accident this

court in applying the law to a like state of facts in Carlson *v.* O. S. L., etc., R. R. Co., 21 Or., 450, by Bean, J., said that if "the danger were increased by the negligence of the master to use proper care before the storm to keep the bridge in repair or to ascertain the condition of the track or bridge after the storm, or to take due or proper precautionary measures to prevent accidents as the exigency of the situation might require, he did not assume such risks. The fact that the track was known to be in a dilapidated condition and out of repair did not relieve the master of the discharge of his duty in the premises. The deceased could still expect from it the exercise of such care and vigilance and require it to take such precautionary measures to prevent accidents as the exigencies of the case, having due regard to the safety of its employés, would suggest to prudent and cautious men experienced in that particular branch of
67 railroad business."

The risk which the plaintiff assumed was only such as belonged to the work of a shoveler engaged to clear slides and other obstructions from the track. He was not out on the road, as counsel say, for the purpose "of finding out where the road needed repairing," but to aid in clearing the track where it was obstructed by slides. He was not a mechanic or bridge carpenter, and had nothing to do with the repairing of bridges, nor knew that any bridges were out of repair. It may be admitted that if the performance of his duties had required that he should ride over the track from place to place where his services were needed to clear the track of obstructions, the risk he assumed included the danger of bridges being undermined or swept out by freshets or floods when they occurred from inevitable accident, but not when the danger might have been ascertained and averted in time to avoid the injury by the exercise of reasonable care or of proper precautions.

If the bridge was out of repair before the storm, owing to the gradual undermining of the center bents from the action of the water, for the time indicated by the evidence for the plaintiff, and the defendant by ordinary carefulness and inspection could have ascertained and known its condition, and under such circumstances and after such an unusual storm, when it knew itself its track was obstructed by a slide below the bridge, and that the work-train must cross it in carrying the shovelers to their place of service, it was the duty of the defendant to send some one over its track, and especially over this bridge, to inspect it and ascertain whether it was in a safe condition before it sent a heavy engine and caboos- loaded with laborers over it.

68 Or if the center bents were in good condition before the storm and were undermined and washed out by the freshet after the storm and the defendant could have ascertained the weakened and dangerous condition of the bridge by reason thereof, after it happened and before the accident, by the exercise of reasonable care or precautions, by sending out a track-walker on the track or in sending some one ahead of the train, and did not do so, the risk arose from its negligence and the defendant would be liable for the injury sustained. In our judgment, the trial court, guided by the

principles of law declared in the cases referred to, which involved injuries to other parties by the same accident properly submitted in its charge all these questions to the jury for their determination. In Knahtla *v.* O. S. L. & U. N. R'y Co., *supra*, the court says: "It had but one track-walker on this section of the road, whose duty it was to pass over the road during the night, and he had not been over this bridge for forty-eight hours, and we think it was a question for the jury to say whether under these circumstances, with such extraordinary storms prevailing, it was negligence for the defendant to send out the train upon which the plaintiff was being carried without making any investigation to ascertain the condition of the bridges over which it was to be carried;" and, again, in Carlson *v.* O. S. L. R. Co., *supra*, the court says: "Whether the defendant by the exercise of reasonable care and vigilance could have anticipated and prevented or provided against the accident, and whether it was the duty of the defendant, in the exercise of reasonable care and prudence under the facts of this particular case, to have sent men ahead of the train on which the deceased was being carried to inspect and examine the bridge before attempting to go over it with the train, are all questions of fact for the jury."

69 Whether it was a proper precaution under the facts to send out a man in advance of the trains was a question properly submitted to the jury. If it was a necessary and reasonable precaution, the plaintiff had a right to assume that the defendant had done it. It was the duty of the defendant to exercise reasonable care or to take such precautionary measures as the requirements of the situation demanded, and whether the defendant used such care or took such precautions as was necessary under the circumstances, as shown by the evidence, was a question of fact to be submitted to the jury for their determination under appropriate instructions from the court. To the claim of the defendant that the accident was not due to any negligence on its part, but was owing to an unusual freshet, produced by an unprecedented storm, something against which no care or vigilance could anticipate or provide, the instructions of the court fully met. In such case the injury was to be regarded as simply an accident that could not be foreseen by reasonable care and vigilance and for which the defendant would not be liable; nor did the court fail in its instructions in respect to the general duty of the master to keep its road in good repair and safe condition to say that such duty must be considered with some qualification when the road has become dilapidated and out of repair and is in the process of reconstruction and the employé engaged in its repair is required in the course of his employment to ride over it, so far as the same was applicable to the facts of this case.

After carefully examining the record it is our judgment that the instructions given by the trial court fully met every aspect of the case as presented by the evidence, and that the jury was

70 properly apprised of their duty in the premises. We shall not, therefore, consider the case further than to say that we have examined the instructions asked by the defendant and think

that the law in them applicable to the case is covered by the instructions given by the court. These instructions, however, are open to the criticism suggested by the court in Knahtla *v.* O. S. L. R'y Co., *supra*. They are twenty-six in number, nearly all of them very long and argumentative, and would encumber many pages to present them.

The plaintiff likewise prepared a long series of instructions, which he submitted to the court and asked to be given. It was doubtless expected that the charge of the court would be made up from these instructions, as is done in some of our circuits, but the trial court, as we shall suppose, after examining and using them as advisory, proceeded to charge the jury in its own language by a connected series of instructions fairly covering the material issues presented by the case. The counsel for the plaintiff highly commends this practice in the trial court as better calculated to enlighten the jury and to aid them in reaching a right verdict, and in this opinion it is sustained by that eminent jurist, Cockrill, C. J., who said: "The charge is made up wholly of requests for instructions from the parties, and the two theories of the case presented by them are not so consistent and harmonious as to render it an easy task for the jury to determine where their duty lay. The fault is inherent in the practice of giving in a charge to the jury the requests for instructions prepared by counsel. They are not uncommonly framed with a view of giving the greatest advantage to the side which presents them and do not in that event tend to lighten the labors of the jury, and when they are accurately and fairly framed on both sides and involve no contradictions the issues are presented in disconnected propositions of law which the jury will find more difficult to comprehend than in a charge presenting all the issues on a single phase of the case together in close contrast and presenting the whole law of the case as emanating from the court without apparent instigation from either side.

71

What can be a greater paradox in the administration of justice or more confounding to a jury than for a court to say to them, as is sometimes done: 'For the plaintiff the court declares the law to be thus. For the defendant, so, and on its own motion as follows,' as though there were three sides to a legal proposition which the jury are at liberty to choose?

It is the duty of counsel to present their prayers for instructions in order to aid the court and to show their position in the case on appeal; but the better rule for the court would be to treat the request only as counsel's suggestions of what they desire to call the jury's attention to, and to embody no more than the substance of them in the charge. The practice of making up the charge from the requests for instructions prepared by counsel leads to the constantly recurring argument in this court that the charge to the jury is inconsistent and misleading and has resulted in the remanding of many causes and perhaps the miscarriage of justice in many others by the indulgence of the presumption that the jury was able

to reconcile the apparent inconsistencies or penetrate the obscurities of the charge."

The judgment is affirmed.

72 (Endorsed as follows:) Filed Feb'y 27, 1893. J. J. Murphy, clerk.

73 Be it remembered that at a regular term of the supreme court of the State of Oregon, begun and held at the court-room, in the city of Salem, on the first Monday, the 3d day of October, 1892—present, Hon. William P. Lord, chief justice; Hon. Robert S. Bean, associate justice; Hon. Frank A. Moore, associate justice, and J. J. Murphy, clerk—the following proceedings were had on Monday, the 27th day of February, 1893, the same being the 85th judicial day of said term:

Judg. Sup. Court, 2d Appeal.

FRANCIS CONLON, Respondent, v. OREGON SHORT LINE & UTAH NORTHERN RAILWAY COMPANY, Appellant.	Appeal from Washington County.

This cause having heretofore, to wit, on the 3d day of February, 1893, been argued and submitted by the attorneys of the respective parties above named and by the court then reserved for further consideration, and the court, having duly considered all the questions presented by the transcript herein and the arguments of the respective attorneys thereon and being now fully advised in the premises, finds that there is not error as alleged. It is therefore considered, ordered, and adjudged that the judgment in this cause in the court below rendered be, and the same hereby is, in all things affirmed, and that the respondent recover of appellant and D. P. Thompson, its surety upon the appeal, the sum of two thousand two hundred and fifty ($2,250 00) dollars and interest thereon since the 24th day of June, 1892, at the rate of eight per cent. per annum, and his costs and disbursements in this court upon said appeal, allowed and taxed at $—, and his costs and disbursements in the court below taxed and to be there taxed.

74 It is further ordered that the cause be remanded to the said court below, and that a judgment be there entered and docketed in accordance herewith.

75 *Pet. for Writ of Error.*

In the Supreme Court of the State of Oregon.

FRANCIS CONLIN, Plaintiff and Respondent,
vs.
OREGON SHORT LINE AND UTAH NORTHERN RAILWAY COMPANY, Defendant and Appellant.

To the Honorable William P. Lord, chief justice of the supreme court of the State of Oregon:

The petition of your petitioner, The Oregon Short Line and Utah Northern Railway Company, the defendant and appellant in the above-entitled cause, respectfully represents and shows—

That heretofore, to wit, on the third day of October, 1890, an action was begun in the circuit court of the State of Oregon for the county of Wasco, in which Francis Conlin, the plaintiff above named, was the plaintiff and your petitioner was the defendant, in and by which said action plaintiff sought to recover of and from this defendant damages, for alleged injuries alleged to have been occasioned by the negligence of this defendant, largely in excess of the amount and value of two thousand dollars, exclusive of interests and costs, and the amount in controversy in said action exceeded the sum of two thousand dollars, exclusive of interests and costs; that thereafter and within ten days from the service of summons in said action upon your petitioner and before the time to appear and answer therein had expired your petitioner presented and filed with the said circuit court of Wasco county its petition for a removal of the said cause to the circuit court of the United States for the district of Oregon, and at the same time presented and filed a good and sufficient bond upon such removal, as
76 is by the law and practice in such cases made and provided, and in and by which said petition for removal your petitioner presented as its ground for removal the causes hereinafter set forth.

Your petitioner further shows that thereafter and on the tenth day of November, 1890, that being the first day of the regular term of the said circuit court next succeeding the presentation and filing of your petitioner's said petition and the first day upon which the said petition could be heard and considered by the said circuit court, with whom your petitioner's said petition had been presented and filed, said circuit court made its order approving the bond of your petitioner and taking under advisement said petition for removal; and thereafter and on the 13th day of November, 1890, the said petition for removal of your petitioner was by the court overruled and denied, the said court then and there ordering that the said cause against your petitioner should be retained in the said circuit court for further proceedings therein; to which ruling, denying your petitioner's said petition for removal, your petitioner then and there, in open court, excepted and objected, and then and there protested against further proceedings in the said court, and

based its objection and protest against such proceedings therein upon the ground that the said cause against your petitioner was removable to and by your petitioner's said petition and bond had been removed to the circuit court of the United States for the district of Oregon; which said protest and objection by your petitioner were by the court overruled, and the said cause ordered to be retained subject to the protest and objection of your petitioner, and all proceedings thereto had in the said cause, as hereinafter set forth, were had over the objection and protest of your petitioner, based upon the fact that the said cause had been so removed.

Your petitioner further shows that thereafter such proceed-
*77 ings were had in the said cause in the said circuit court of the State for the county of Wasco that on the 24th day of February, 1891, judgment was recovered against your petitioner in favor of the plaintiff in said action in the sum of three thousand five hundred dollars, and thereafter and within the time allowed by the laws of the State of Oregon therefor your petitioner duly took its appeal to the honorable the supreme court of the State, and in and by which said appeal, among other things, your petitioner made and assigned as one of the grounds of error in the said circuit court and as one of the grounds why the judgment of the said circuit court should be reversed that the judgment of the said circuit court was a nullity and without jurisdiction for that your petitioner, the defendant in said action, had by its said petition and bond removed the cause to the circuit court of the United States for the district of Oregon, and your petitioner made upon the said appeal the following assignments of error in relation thereto, to wit:

That the circuit court of the State for said county of Wasco erred in denying your petitioner's petition for a removal of the cause to the circuit court of the United States for the district of Oregon and in ordering and directing that the cause and all proceedings had therein be had in the said circuit court of the State for the county of Wasco.

That, your petitioner's said appeal coming on to be heard before this honorable supreme court, your petitioner then and there presented, among other things, the said assignments of error and urged and contended that the judgment of the court below was without jurisdiction for that the said cause had been removed, and thereupon, your petitioner's appeal having been submitted, the honorable the said supreme court of the State in all respects affirmed the
78 order and direction of the said circuit court of the State for the county of Wasco, denying your petitioner's said petition for removal and ordering and directing that the said cause be retained in the said circuit court for further proceedings therein; to which your petitioner then and there excepted and objected; but so it is that said the honorable the supreme court of the State reversed the said judgment of the circuit court from which the said appeal had been taken upon other grounds *other* than a denial by the said circuit court of your petitioner's said petition for removal and for errors occurring at the trial of the said action; whereupon the said cause

was by the mandate of the honorable the said supreme court of the State remanded to the said circuit court from which the appeal had been taken for further proceedings therein, but not for the purpose of being certified to the circuit court of the United States for the district of Oregon.

Your petitioner further shows that thereafter and by reason of the disqualification of the trial judge of the said circuit court of the State of Oregon for the county of Wasco the said cause was certified to the circuit court of the State of Oregon for the county of Washington for further proceedings and trial; and thereupon and in the said last-named court, over the objection and protest of your petitioner, by reason of the said removal by your petitioner undertaken to be had from the said circuit court of the county of Wasco, a judgment was entered after the trial of said action in the circuit court of the State of Oregon for the county of Washington in the sum of $2,250.00, said judgment being taken and entered against your petitioner in favor of the said Francis Conlin, the plaintiff in said action; which said judgment was entered on the 24th day of June, 1892.

79 Your petitioner further shows that thereafter and within the time allowed by the statutes of the State of Oregon therefor your petitioner duly appealed from the said judgment of the circuit court of the State of Oregon for the county of Washington to the honorable the supreme court of the State, where again, among other things, your petitioner duly urged and presented to the honorable the supreme court the question of the jurisdiction of the court below to enter the said judgment by reason of the removal by your petitioner theretofore had and effected and the filing of your petitioner's said petition for removal therefor and the bond therefor in the said circuit court of the State of Oregon for the county of Wasco, and, among other things, upon the said last-named appeal and by the notice of appeal therefor your petitioner assigned as error and as a cause for the reversal of the said judgment of the circuit court of the State of Oregon for the county of Washington that the said judgment was without jurisdiction of the said circuit court to render or enter the same, for that by your petitioner's said petition for removal theretofore filed in the said cause and its said bond on removal the said cause was removable to and had been thereby removed to the circuit court of the United States for the district of Oregon, and the said circuit court of the State for the county of Washington was without jurisdiction to entertain proceedings in said cause or enter judgment therein.

Your petitioner further shows that thereafter, the said cause coming on to be heard upon appeal by the said supreme court, such proceedings were had therein that the said judgment of the court below rendering judgment against your petitioner and in favor of the said plaintiff was in all respects affirmed, and the jurisdiction of the said court below, from which the said appeal was taken,

80 to render and enter said judgment was by the said supreme court adjudged and affirmed, and the objection of your petitioner arising by the said removal was overruled and denied and

a decision then and there made adversely to your petitioner, against the right by your petitioner claimed, of the right to a trial of the said action in the circuit court of the United States for the district of Oregon by reason of the removal proceedings by your petitioner theretofore had in the cause.

Your petitioner further shows that the petition for removal heretofore referred to and by your petitioner filed, as hereinbefore stated, was a verified petition and, among other things, set forth and charged and represented the fact, as fact it be, that the said action so begun against your petitioner by the said Francis Conlin was an action of a civil nature, and that the amount in dispute exceeded, exclusive of interests and costs, the sum of two thousand dollars; that your petitioner was a corporation organized, existing, and possessing certain corporate powers embraced in, depending upon, and provided for in two certain acts of the Congress of the United States, therein in said petition particularly set forth and mentioned, creating and organizing the Oregon Short Line Railway Company, a corporation in the Territories of Utah, Idaho, and Wyoming, and creating and organizing the Utah and Northern Railway Company, a corporation in the Territories of Utah, Idaho, and Montana, your petitioner charging likewise in said petition that your petitioner was a consolidated corporation created by the organization and consolidation of the two railway companies last above mentioned and certain other railway companies, whose names and corporate origin were specifically set forth in the said petition, by articles of consolidation entered into by the said constituent companies, and
81 that such consolidation was perfected under and pursuant to the laws of the United States and of the State of Nevada and of the Territories of Utah and Wyoming in force on the first day of August, 1889, and that under and by virtue of the organization of the constituent companies and such consolidation your petitioner was in fact and claimed to be a corporation existing under and pursuant to and by virtue of the acts of the Congress of the United States and claimed such corporate existence under and pursuant to the said acts.

The petition of your petitioner further alleged that the said action arose under the Constitution and laws of the United States, hereinbefore mentioned, upon which the existence of your petitioner and its corporate functions and powers depend, and that by virtue of the Constitution and laws of the United States your said petitioner had a defense to said action arising thereunder, and because of such corporate organization and existence, and because of the said action arising under the said Constitution and laws of the United States, and because of your petitioner having a defense arising thereunder your petitioner claimed the right by its said petition of removal of the said cause.

Your petitioner further shows that in and by its said petition of removal your petitioner showed and set forth that the time to plead or answer in the said cause had not at the time of the presentation and filing of the said petition for removal expired, and in consideration of the premises your petitioner prayed the said circuit court of

the State of Oregon for the county of Wasco to proceed no further in the cause except to make an order of removal to the circuit court of the United States for the district of Oregon, and for that purpose to approve the bond offered by your petitioner and to cause the record of the said action to be removed to the said circuit court of the United States.

82 That at the time of the presentation and filing of the said petition for removal your petitioner presented a good and sufficient bond, in the penal sum of five thousand dollars, to the effect that it would enter and file on the first day of the next session of the said circuit court of the United States for the district of Oregon copies of all processes, pleadings, depositions and testimony, and other proceedings in the action, and that it would do such other and appropriate acts as under and by the statute of the United States are required in that behalf upon removal of a suit from a State court into the said United States court, and that it would well and truly pay all costs that might be awarded by the said circuit court of the United States if said court should hold that the said action was wrongfully or improperly removed thereto, and which said bond, as heretofore averred by your petitioner, was by the said circuit court of the State for the county of Wasco duly approved, both in substance and in form; and your petitioner now shows to the honorable the chief justice of the supreme court of the State of Oregon that the judgment heretofore by the said supreme court entered affirming the judgment of the said circuit court of the State for the county of Washington is a final judgment in the said action in so far as the courts of the State of Oregon are concerned and is the court of last resort of said State to which your petitioner could by writ of error appeal or otherwise be heard; and your petitioner now respectfully shows that it is advised by counsel, and upon such advice so charges the fact to be, that the said cause was removable to and was removed to the circuit court of the United States for the district of Oregon, and that the judgment of the honorable the supreme court was without jurisdiction, and that the only judgment which could be entered therein was a judgment reversing the judgment of the said circuit court of the State for

83 Washington county ordering and directing this said cause to be certified to the circuit court of the United States for the district of Oregon; and forasmuch as the right of your petitioner to such removal has been denied by the said supreme court of the State your petitioner is advised, and so charges the fact to be, that good cause exists for a writ of error from the Supreme Court of the United States to the honorable the supreme court of the State in this action.

Wherefore your petitioner prays the allowance of a writ of error from the said Supreme Court of the United States to the supreme court of the State of Oregon, herewith tendered, duly issued by the clerk of the circuit court of the United States for the district of Oregon; that a citation may be issued thereon, and for such other process as will enable your petitioner to obtain a review of the said

cause by the Supreme Court of the United States; and in duty bound your petitioner will ever pray.

THE OREGON SHORT LINE AND UTAH NORTHERN RAILWAY COMPANY,
By W. W. COTTON, *Its Attorney.*

STATE OF OREGON, } ss:
County of Multnomah, }

I, W. W. Cotton, being duly sworn, depose and say: I am the general attorney of the petitioner above named in the State of Oregon and as such have the authority and power from the said company to make and present in its behalf the foregoing petition. I am fully acquainted with the facts set forth in the foregoing petition and the same in all respects are true, as I verily believe.

W. W. COTTON.

Subscribed and sworn to before me this 8th day of March, 1893.

[Seal of J. M. Long, Notary Public, State of Oregon.]

J. M. LONG,
Notary Public for Oregon.

84 & 85 The foregoing petition being this day presented to me, the undersigned, chief justice of the supreme court of the State of Oregon, and being by me considered, the same is now allowed and the writ of error applied for approved.

March 9th, 1893.

WM. P. LORD,
Chief Justice Sup. Court, Oregon.

[Endorsed:] No. —. In the supreme court of the State of Oregon, county of ——. Francis Conlin, plaintiff and respondent, *vs.* Oregon Short Line and Utah Northern R'y Co., defendant. Petition for writ of error. Due service of the within — by certified copy, as prescribed by law, is hereby admitted at ——, this — day of ——, 18—. —— ——, attorney for ——. Filed March 9, 1893. J. J. Murphy, clerk, by —— ——, deputy. Law department Union Pacific System (Pacific division). W. W. Cotton, gen. att'y. Zera Snow, ass't gen. att'y.

86 *Bond on Writ of Error.*

In the Supreme Court of the United States.

THE OREGON SHORT LINE AND UTAH NORTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
FRANCIS CONLIN, Defendant in Error.

Know all men by these presents that I, Frank Dekum, of Multnomah county, Oregon, am held and firmly bound into Francis

Conlin, of Wasco county, Oregon, in the sum of six thousand dollars ($6,000.00), to be paid to the said Francis Conlin, his executors or administrators; to which payment, well and truly to be made, I do bind myself, my heirs, executors, and administrators, firmly by these presents.

Sealed with my seal. Dated this 9th day of March, 1893.

Whereas the above-named Oregon Short Line and Utah Northern Railway Company hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of the State of Oregon:

Now, therefore, the condition of this obligation is such that if the above-named Oregon Short Line and Utah Northern Railway Company shall prosecute its said writ of error to effect and answer all costs and damages, including just damages for delay, if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

FRANK DEKUM. [SEAL.]

87 STATE OF OREGON,)
County of Multnomah,) *ss*:

I, Frank Dekum, being first duly sworn, upon oath say: I am worth the sum of twelve thousand dollars in the State of Oregon, and have property in the State of Oregon not exempt from execution of the value of more than twelve thousand dollars. I signed the foregoing undertaking.

FRANK DEKUM.

Subscribed and sworn to before me this 9th day of March, 1893.

[Seal of Wallace McCamant, Notary Public, State of Oregon.]

WALLACE McCAMANT,
Notary Public for Oregon.

This bond approved this 9th day of March, 1893.

WM. P. LORD,
Chief Justice of the Supreme Court of the State of Oregon.

[Endorsed:] In Supreme Court United States. Oregon Short Line and Utah Northern Railway Co., pl'ff in error, *vs.* Francis Conlin, def't in error. Supersedeas bond on writ of error. Filed March 9, 1893. J. J. Murphy, clerk.

88 *Citation.*

UNITED STATES OF AMERICA:

To Francis Conlin, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Oregon,

wherein The Oregon Short Line and Utah Northern Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable William P. Lord, chief justice of the supreme court of the State of Oregon, this the 9th day of March, in the year of our Lord one thousand eight hundred and ninety-three.

WM. P. LORD,
Chief Justice of Supreme Court, State of Oregon.

DISTRICT OF OREGON, *ss:*

UNITED STATES MARSHAL'S OFFICE.

I, L. T. Barin, United States marshal for the district of *district of* Oregon, hereby certify that I served the foregoing citation on the above-named Francis Conlin on the 21 day of March, 1893, at Wasco county, Oregon, by delivering to and leaving with Alfred S. Bennett, the attorney of record for the said Conlin in the said cause of Francis Conlin *vs.* Oregon Short Line and Utah Northern Railway Company, a true and correct copy of the same, the said copy being so served on the day and at the place aforesaid.

L. T. BARIN,
United States Marshal, District of Oregon,
By MALCOLM S. JAMESON, *Deputy.*

Fees, $4.12.

89 [Endorsed:] In the circuit court U. S., dist. of Oregon. Collins *vs.* O. S. L. & U. N. R'y Co. Citation on appeal. Filed March 23, 1893. J. J. Murphy, clerk.

90 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Oregon, Greeting:

Because in *a* record and proceedings, and also in the rendition of the judgment of a plea which is in the said supreme court of the State of Oregon, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Oregon Short Line and Utah Northern Railway Company and Francis Conlin, wherein a right was claimed under a statute of the United States and the decision was against the right specially set up and claimed under such statute, a manifest error hath happened, to the great damage of the said Oregon Short Line and Utah Northern Railway Company, as by its complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the

parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with the writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record of proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, the 9th day of March, in the year of our Lord one thousand eight hundred and ninety-
91 three.

[Seal United States Circuit Court, Oregon.]

R. H. LAMSON,
Clerk of the Circuit Court of the United States
for the District of Oregon,
By R. B. LAMSON,
Deputy Clerk.

The above writ allowed this 9th day of March, A. D. 1893.

WM. P. LORD,
Chief Justice of the Supreme Court of the State of Oregon.

92 [Endorsed:] O. S. Line & U. N. R'y Co., pl'ff in error, *vs.* Francis Conlin, def't in error. Writ of error. Filed March 9, 1893. J. J. Murphy, clerk.

93 *Certificate of Clerk of Sup. Court.*

In the Supreme Court of the State of Oregon.

FRANCIS CONLON
v.
OREGON SHORT LINE & UTAH NORTHERN R'Y COMPANY.

I, the undersigned, J. J. Murphy, clerk of the supreme court of the State of Oregon, do hereby certify that the foregoing transcript is a full, true, and complete copy of the record of said action certified to and filed with our said court as the transcript on appeal from the judgment of the circuit court of the State of Oregon for the county of Washington from which the said appeal was taken and is the record and transcript upon which said appeal was heard and the judgment of our said supreme court entered thereon on the 27th day of February, 1893, save and except the bill of exceptions in the said cause, which is omitted therefrom pursuant to the stipulation of the counsel for the parties, a true and correct copy of which is attached to the said record.

I further certify that the foregoing transcript likewise contains a full, true, and correct copy of the judgment of our said supreme court upon the said appeal, entered on the said the 27th day of February, 1893, and a full, true, and correct copy of the opinion of the court filed and upon which said judgment was entered.

94 I further certify also that the foregoing transcript contains a full, true, and correct copy of the judgment of our said supreme court in said action entered upon a former appeal taken in the said cause, which said judgment was entered on the 11th day of February, 1892, and also a full, true, and correct copy of the opinion in the said cause upon which said former judgment upon said former appeal was entered.

I further certify that the petition for writ of error in said cause and the endorsements thereon, and the bond thereon and the endorsement thereon, and the citation and proof of service endorsed thereon, and writ of error and endorsements thereon, all of which are attached to the above and foregoing, are the original petition, bond, citation, and writ lodged with and now in my office, and I do certify that the above and foregoing are such original papers so lodged and filed with me, and that the foregoing transcript is a true and correct copy of the papers and pleadings filed and of the proceedings had in the above-entitled cause in our said court as the same appeared of record and on file in my office.

In witness whereof I have hereunto set my hand and the seal of the supreme court of the State of Oregon, at my office, in the city of Salem, in said State, this the 7th day of April, 1893.

[Seal Supreme Court, State of Oregon.]

J. J. MURPHY,
Clerk of the Supreme Court of the State of Oregon.

95 In the Supreme Court of the State of Oregon.

FRANCIS CONLIN, Respondent,
vs.
OREGON SHORT LINE AND UTAH NORTHERN RAILWAY COMPANY, Appellant.

Comes now the appellant and gives the court to know and be informed that there is on file herein in this cause a petition by this appellant, as plaintiff in error, against Francis Conlin, the respondent herein, as defendant in error, being a petition for the allowance of a writ of error from the Supreme Court of the United States to this honorable court to review the judgment of this court, made and entered herein, affirming the judgment of the court below, from which the appeal to this court was taken; that said petition is addressed to the honorable the chief justice of the court and has been duly presented to the chief justice and has been by the chief justice of the court allowed, and the writ of error permitted as prayed for; pursuant to which this appellant, the plaintiff in error to the said writ, likewise gives the court to know and be informed

that a writ of error has been sued out upon such petition and issued and allowed, and commanding the clerk of this court to certify the record of this cause to the Supreme Court of the United States, and that a citation upon such writ has duly issued and has been served upon the defendant in error to the said writ, the said Francis Conlin herein, and that a supersedeas bond herein has been and is now on file herein; and thereupon this appellant, The Oregon Short Line and Utah Northern Railway Company, the plaintiff in error to the said writ, now presents and files herein its assignment
96 of error upon which it will rely upon the said writ of error, to wit:

First. There was error in the judgment of the court below and in the judgment of this court in refusing to certify this cause to the circuit court of the United States for the district of Oregon, and error in entertaining jurisdiction in this cause and in rendering judgment herein against the plaintiff in error to the said writ—

For that this appellant, the plaintiff to the said writ, did, in the circuit court of the State of Oregon for the county of Wasco, at the commencement of this action therein and before the time for appearance and answer therein had expired, file with the said court its petition for a removal of this cause to the circuit court of the United States for the district of Oregon, and did likewise, at the time of the filing and presentation of the same to the court, present its bond upon such removal as by the law and the practice in such cases made and provided, and it was error to deny the said petition and refuse to remove the said cause and to entertain, and take proceedings therein after the filing of such petition, protest and objection against which was by this appellant duly made; and it was likewise error in the judgment of this the honorable the supreme court in affirming the order of the court below refusing to remove the said cause and in affirming the action of the said court in entertaining jurisdiction thereof after the filing of the said petition for removal and in overruling the objection and exception of this appellant to further proceedings in the said cause after such petition for removal.

Second. The judgment of the court below from which the appeal herein was taken to this the honorable supreme court and
97 the judgment of this the honorable the supreme court entered herein affirming the said judgment was erroneous, in this:

That the appellant herein and the plaintiff to the said writ of error at the commencement of this action in the circuit court of the State of Oregon for the county of Wasco, where the said action was begun, duly filed its petition for a removal of this cause to the circuit court of the United States for the district of Oregon, alleging and setting forth as the ground of the said petition in substance that this appellant was a Federal corporation organized and inconporated under the laws of the United States and dependent for its corporate existence and corporate powers upon such laws, and that by reason thereof this action was an action arising under the Constitution and laws of the United States, and that this appellant, as

the defendant in said action, had by virtue of its incorporation and corporate existence a defense under the laws of the United States; which said petition was duly presented to the said circuit court in which said action was begun prior to the expiration of the time for appearance and answer therein, and at the time of the presenting and filing thereof this appellant, as the defendant in said action, duly presented its bond upon removal as by law provided; which said bond was by the said circuit court of the State for the county of Wasco approved, and it was error to entertain jurisdiction of the said cause after the said petition for removal and to have or take further proceedings in the said State court in said action after the same, and the judgment of the court below had therein and by the honorable the supreme court affirmed was without jurisdiction, in that by the petition aforesaid the said cause was removable to and had been removed to the circuit court of the United States for the district of Oregon, and the judgment of the honorable the supreme court of the State, to review which the said writ of error has
98 been sued out, is without jurisdiction, in that said cause was removable and had been removed as and in and by the said petition prayed for, and the only judgment which the said the honorable the supreme court of the State could or should enter thereafter was a judgment and order reversing the judgment of the court below on the ground of a want of jurisdiction to render the same, with an order and direction to the said court to remove the said cause to the circuit court of the United States for the district of Oregon.

Wherefore this appellant herein, plaintiff to the said writ of error, prays leave to file this the assignment of error upon the said writ of error sued out, and for an order that the same be certified as a part of the record and transcript in obe*ya*-nce to the said writ.

THE OREGON SHORT LINE AND UTAH NORTHERN RAILWAY CO.,
By W. W. COTTON & ZERA SNOW,
Its Attorneys.

STATE OF OREGON, *ss:*

CLERK'S OFFICE OF THE SUPREME COURT.

I, J. J. Murphy, clerk of the supreme court of the State of Oregon, do hereby certify that the above and foregoing is a full, true, and correct copy of the original assignment of error filed by the Oregon Short Line and Utah Northern Railway Company in the above-entitled cause upon its petition for a writ of error filed herein from the Supreme Court of the United States to our said court, and is a full, true, and correct copy of the whole thereof, as the same now appears and on file in my office; that the same constitutes and is a part of the transcript and record by me certified to the Supreme Court of the United States under and pursuant to a writ of error sued out therefrom and lodged with
99 me as the clerk of the said supreme court; and the foregoing copy of assignment of error is by me now certified to be at-

tached to and as constituting a part of such transcript and record by me certified, pursuant to and in obedience to the said writ of error.

Witness my hand and official seal this the 15th day of April, 1893.

[Seal Supreme Court, State of Oregon.]

J. J. MURPHY,
Clerk of the Supreme Court of the State of Oregon.

100 In the Supreme Court of the United States.

THE OREGON SHORT LINE AND UTAH NORTHERN RAILWAY COMPANY
vs.
FRANCIS CONLIN, Defendant in Error.

It is stipulated by and between the attorneys of record for the plaintiff in error and defendant in error that there may be printed as the printed record in this cause the following parts of the record only, but with leave to either party hereto to refer to such other parts of the record as if the same had been printed, to wit:

1. The pleadings in the cause.

2. Petition and bond for removal to the circuit court of the United States for the district of Oregon and the orders of the court made thereon.

3. Mandate of the supreme court and judgment order thereon reversing the first judgment had in the cause in the circuit court for Wasco county, Oregon.

4. Order changing the place of trial for the retrial of the action to the circuit court for Washington county.

5. The judgment upon the verdict of the circuit court for Washington county.

6. The opinion of the supreme court affirming the judgment of the circuit court for Wasco county.

7. Petition for writ of error herein and order of allowance thereon, the writ of error and order of allowance thereon, the assignment of error, and the supersedeas bond filed upon allowance of the writ, and order of approval thereon endorsed.

101 This stipulation to be without prejudice to objections which the defendant in error may interpose upon the question of whether the writ has been properly sued out and whether a writ of error lies herein.

JOHN F. DILLON,
Attorney for Plaintiff in Error.
ALFRED S. BENNETT,
Attorney for Defendant in Error.

102 [Endorsed:] Case No. 15,307. Supreme Court U. S., October term, 1893. Term No., 929. The Oregon Short Line & Utah Northern Railway Co. *vs.* Francis Conlin. Stipulation to print parts of record only.

[Stamped:] Office Supreme Court U. S. Filed Oct. 12, 1893. James H. McKenney, clerk.

[Endorsed:] No. —. In the supreme court of the State of Oregon, October term, 1892. Francis Conlon, resp., *vs.* O. S. L. & U. N. R'y Co., app.

Endorsed on cover: Case No. 15,307. Oregon supreme court. Term No., 229. The Oregon Short Line and Utah Northern Railway Company, plaintiff in error, *vs.* Francis Conlin. Filed April 27th, 1893.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 147.

THE OREGON SHORT LINE AND UTAH NORTHERN RAILWAY COMPANY, Plaintiff in Error,

vs.

JANE SKOTTOWE, Defendant in Error.

Brief and Argument of Plaintiff in Error.

JOHN F. DILLON,
JOHN M. THURSTON,
Attorneys for Plaintiff in Error.

McGILL & WALLACE, Law Printers, Washington, D. C.

IN THE

Supreme Court of the United States.

THE OREGON SHORT LINE AND UTAH NORTHERN RAILWAY COMPANY, Plaintiff in Error, vs. JANE SKOTTOWE, Defendant in Error	No. 147.

Brief and Argument of Plaintiff in Error.

It is our purpose to submit to the court but one question, which is—

Did the trial court err in refusing to remove the cause to the Circuit Court of the United States?

The plaintiff in error was brought into court upon complaint which alleged (see paragraph 1 of complaint, page 1 of record) "that the defendant is a corporation duly organized, existing, and doing business in the State of Oregon, and as such corporation is and was at all the times and dates hereinafter mentioned and long prior thereto in the operation of a line of railroad running from Portland, Oregon, to The Dalles and Pendleton, Oregon, and other places farther east, generally known as the Oregon Railway and Navigation Company's line

of road, and in connection therewith and incident thereto has been for such time and now is in the possession of and operating a line of boats running from The Dalles, Oregon, to Portland, Oregon, together with all the bridges, wharf boats, ways, etc., used in getting to and from the landings of the aforesaid line of boats, and had been and was and still is carrying passengers thereon as a common carrier for hire."

It will be noticed that the character of the incorporation is not specifically stated, nor is any reference made to its articles or place of incorporation; and it will doubtless be contended that the plaintiff in her complaint did not allege or tender the corporate character or charter powers of The Oregon Short Line and Utah Northern Railway Company. We insist, however, that a bill of complaint which alleges that the defendant is an incorporated company, tenders, without any further or additional allegation, the charter or articles of incorporation of the corporation, including all those statutes and grants of power under and by virtue of which it acquired the right to become a corporation and to exercise corporate powers and privileges.

It must be held that the complaint alleges all those facts which it would be necessary for the plaintiff to prove were each and every allegation of the complaint denied by answer. For the purposes of determining as to whether or not the defendant could remove on the ground that the suit was one arising under the Constitution and laws of the United States (as the petition for removal must be filed on or before the answer day), it must be assumed that the cause of action upon which suit is brought arises upon all the facts which it would be necessary for the plaintiff to prove to maintain her cause of action, and among the most important of those facts are the corporate existence, the corporate character, and the corporate powers of the defendant.

The corporate existence of the defendant can only be shown by its charter or articles of incorporation and by reference to the statute or statutes authorizing it to become a corporation. A corporation can not exist as such except by authority of law. To prove a corporation is to prove the law of its creation, and an allegation of corporate existence and capacity is an allegation of its charter and the law of its charter. No cause of action can be proven against an alleged corporation until the corporate existence, the corporate powers, and the corporate duties are first proven; and therefore in every petition or complaint filed against an alleged incorporated company, its articles of incorporation and the law of its existence are necessarily tendered as a part of the issue, and whatever cause of action is set up against the defendant is a cause of action arising under whatever law authorized the formation of the corporation, defined its powers, and prescribed its obligations. All this is important, because it will be contended upon the other side that the complaint filed in the State court does not disclose a cause of action arising under any law of the United States, and therefore under the decision of this court in Tennessee *v.* Union and Planters' Bank (152 U. S., 454), and in Chappell *v.* Waterworth (155 U. S., 102), the cause was not removable under the act of August 13, 1888.

It seems to us that the case at bar is clearly distinguishable from those above cited. It is well settled that the Circuit Court of the United States has jurisdiction of a suit against a corporation created by or exercising powers and franchises derived from the statutes of the United States, and therefore the plaintiff can invoke the jurisdiction of the Federal Court by alleging that the defendant is a corporation created under a law of the United States; as no liability can be established against such a corporation without involving a consideration and determination as to the powers conferred and correspond-

ing obligations and duties imposed by the Federal act. An alleged cause of action which would entitle the plaintiff to bring his suit in the Circuit Court of the United States would be such a one as the defendant could remove to the Circuit Court of the United States. Can it be contended that a plaintiff may bring a cause of action and establish a liability against an alleged corporation, defendant, without submitting to the court a consideration of the charter powers and duties of such defendant? If so, then it is optional with the plaintiff, not only to choose for himself a tribunal, National or State, but to choose also for the corporation, defendant. If every cause of action against a corporation created under Federal enactment involves the consideration of its Federal powers, is it possible that the plaintiff's cause of action against it does not arise under the laws of the United States, because the plaintiff elects to allege that the defendant is an incorporation without alleging the character of such incorporation or the laws under which it acquired the right to be an incorporation?

If a claimant sues the Union Pacific Railway Company, which was organized by an act of Congress of the United States, this court has held that the cause of action arises under the laws of the United States, and no failure of the plaintiff to fully state the character of the Union Pacific Railway Company can give him a cause of action not arising under the laws of the United States. If his cause of action does arise under the law of the United States incorporating the Union Pacific Railway Company, can the plaintiff change the character of that cause of action by any failure on his part to clearly specify and allege the Federal character of the Union Pacific Railway Company? It would seem as if the mere statement of this proposition is its answer; that a cause of action can not be stated against a corporation without tendering an examination and adjudication of its charter powers,

duties and obligations, and therefore of the laws upon which its corporate existence rests.

Again, is it possible that the plaintiff by a *misstatement* as to the corporate character of the defendant can deprive the defendant of the right to have the cause of action against it—which would certainly arise under the laws of the United States upon proper allegation as to defendant's Federal charter—heard and determined in the Federal court? Suppose the plaintiff brings a cause of action against the Union Pacific Railway Company alleging that it is a corporation of the State of Nebraska! Can such allegation deprive the defendant of the right to select the Federal forum? Does such misstatement of the corporate character of the defendant change the character of the cause of action? And does not the cause of action upon which suit is brought still arise under the laws of the United States? And is not a consideration of the charter of the defendant as essential to the maintenance and establishment of that cause of action as if the true corporate character of the defendant had been specifically stated in the petition or complaint? To hold otherwise would confer upon the plaintiff the sole right of selection of the forum, regardless of the laws of the United States, and would hold out the strongest possible inducement for non-statement or misstatement of the corporate character of the defendant. We do not believe that the Congress of the United States ever intended to permit a plaintiff by fraudulent or incomplete allegation, to oust the jurisdiction of the courts of the United States, or to prevent the removal of a cause of action which would manifestly arise under the laws of the United States, were the true corporate character of the defendant fairly and fully disclosed.

The attention of the court is also called to the fact that the complaint alleges "that the defendant is a corporation *duly organized*." What is the true construction of

an allegation of *due organization?* Is it not equivalent to a declaration that that corporation is organized in due form and under due authority of law? And is not such an allegation a direct tender of proof that the defendant is a corporation *de jure?* Will proof that it is acting as a corporation and exercising corporate powers be sufficient to maintain an allegation that it is *duly* organized? We submit that such an allegation can only be sustained by proof of a regular, valid, lawful organization, under some law which authorizes the corporation to exercise corporate powers and franchises. We further submit that the due incorporation of a company can not be shown, its right to exercise corporate powers and franchises established, without a tender of the law itself from which the power must necessarily be derived. Corporations are not born! Nature has provided no method for their creation or perpetuation; they have no ancestry or posterity; they are creatures of the law; there is no principle of the common-law recognized in this country under which they can come into existence, carry on business, or exercise powers. The existence of the corporation itself must spring from a statute—a statute enacted by some State legislature or by the Congress of the United States. To allege a corporate existence is to allege a statute under which it has been created and under which it lives. To allege the statute of its creation is to allege that the statute has been enacted by a competent legislative body; and that allegation can only be sustained by direct reference to the law itself, and to the legislature or the Congress which enacted it; and the due organization of the corporation will not then be established until the law has been examined by the court and found to be such a one as the legislative body could enact, and that the corporation is such a one as has the right to exist, transact business, and incur liabilities.

If we are right in our contention thus far, we may

properly ascertain the corporate character of the railway company by a reference to the allegations contained in the petition for removal. (Record, pp. 3 and 4.) We find that the plaintiff in error was created by a consolidation of certain other railway companies. Two of the corporations merged in the consolidation were the Utah and Northern Railway Company and the Oregon Short Line Railway Company. These two last-named companies were merged in the consolidated corporation, The Oregon Short Line and Utah Northern Railway Company, this plaintiff in error.

In order to ascertain the corporate character, powers, and obligations of the plaintiff in error, we must necessarily examine the charter powers, etc., of each of the constituent companies, for the consolidated corporation has no powers and can exercise no franchises except such as it obtained by reason of its succession to each of the corporations entering into the consolidation. The constituent companies do not perish; they are simply continued under the consolidated name. Nothing is lost by the union of many corporations into one; and when we ascertain and define all the rights and powers and franchises and all the duties and obligations and limitations of each of the constituent companies, we have ascertained the character of the consolidated company.

The Utah and Northern Railway Company was incorporated in the Territory of Utah, and subsequently it was created a corporation in the Territories of Utah, Idaho, and Montana by the following act of Congress:

"An Act creating the Utah and Northern Railway Company a corporation in the Territories of Utah, Idaho and Montana, and granting the right of way to said company through the public lands.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the right of way through the public lands of the

United States and other privileges heretofore granted by law to the Utah and Northern Railroad Company, are hereby modified and regranted so as to enable the Utah and Northern Railway Company and its assigns to build their road by the way of Marsh Valley, Portneuf River and Snake River Valley instead of by way of Soda Springs and Snake River Valley, as originally granted.

"SEC. 2. And said company is hereby made a railway corporation in the Territories of Utah, Idaho, and Montana, under the same conditions and limitations and with the same rights and privileges that it now has and enjoys under its articles of incorporation: *Provided*, That said corporation shall at all times hereafter be subject to all the laws and regulations in relation to railroads of the United States or of any Territory or State through which it may pass. And suits against said corporation may be instituted in the courts of said Territories or either of them having jurisdiction by the laws of such Territory.

"SEC. 3. Congress may at any time add to, alter, amend, or repeal this act.

"Approved June 20, 1878."

The Oregon Short Line Railway Company was created a corporation in the Territories of Utah, Idaho, and Wyoming under the following act of Congress:

"An Act creating the Oregon Short Line Railway Company a corporation in the Territories of Utah, Idaho, and Wyoming, and for other purposes.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Oregon Short Line Railway Company, a corporation of that name duly incorporated and organized under the laws of the Territory of Wyoming, the amended articles of incorporation of which were duly filed in the office of the Secretary of the said Territory on the twelfth day of July, Anno Domini eighteen hundred and eighty-one, be, and the same is hereby, made a railway corporation in the Territories of Utah, Idaho and Wyoming, under the same conditions and limitations and with the same rights and privileges that it now has and enjoys

under said articles of incorporation within the said Territory of Wyoming, and with all the rights and privileges within said Territories of Wyoming, Utah, and Idaho which are secured to railway companies by the act of Congress approved the third day of March, Anno Domini eighteen hundred and seventy-five, entitled 'An act granting to railroads the right of way through the public lands of the United States': *Provided*, That the said corporation shall at all times hereafter be subject to all the laws and regulations of the United States in relation to railroads, or of any Territory or State through which its line of road may pass. And suits against said corporation may be instituted in the courts of said Territories, or either of them having jurisdiction by the laws of such Territory.

"SEC. 2. That Congress may at any time add to, alter, or repeal this act.

"Approved August 2, 1882."

It will be noted that prior to the above acts of Congress the Utah and Northern Railway Company was an incorporation of the Territory of Utah and the Oregon Short Line Railway Company was an incorporation of Wyoming, and that outside of those two Territories neither of said companies had any right to construct or operate railway lines or to perform any other corporate acts. Congress created both of these companies corporations in other Territories. It not only authorized the corporations then existing to extend their railway lines beyond the territorial limits of the jurisdiction of their original incorporation, but it created them corporations in the other Territories. The language employed is capable of no other construction. They are made railway corporations in each of the Territories named in the acts of Congress; and the effect of the Congressional action is a virtual re-enactment of the articles of incorporation of each of those two companies. In order to properly construe said Acts of Congress they must be read as if the original charters or articles of incorpora-

tion of the two companies had been set forth *in hac verba*. It seems to require no elaboration to show that at the time of the creation of the plaintiff in error by consolidation, two of the constituent companies were Federal corporations, created as such by acts of Congress, and none the less Federal corporations because one of them had previously been a corporation of the Territory of Utah and the other a corporation of the Territory of Wyoming. Their corporate powers were Congressional, exclusively so, in all territory and with respect to all railway construction and operation outside of those jurisdictions in which they were first organized as Territorial corporations.

The power of Congress to create a corporation or to take a corporation already existing and to confer additional corporate franchises, rights, and privileges upon it, is undoubted. (See California *v.* Pacific Railroad Company, 127 U. S., at page 39.)

On the first day of August, 1889, the plaintiff in error succeeded to all the corporate rights, powers, privileges, franchises, railway lines, properties, assets, and effects of the Utah and Northern Railway Company and the Oregon Short Line Railway Company. It likewise assumed and became subject to all the duties, obligations, limitations, and undertakings of each of the said constituent companies. The plaintiff in error therefore came into existence under all the acts of the Territories of Utah and Wyoming and under all the acts of the Congress of the United States which had conferred corporate powers and rights, and fixed corporate duties and obligations upon the Utah and Northern Railway Company and the Oregon Short Line Railway Company. There is no way of ascertaining the corporate powers, rights, privileges, and franchises of this consolidated company or of determining its duties, obligations and limitations, without referring to and construing the two acts of Congress hereinbefore cited.

For the purpose of considering the Federal corporate character of the plaintiff in error, we will take the case of one of the said constituent corporations, the Oregon Short Line Railway Company. It will be noticed that under the act of Congress of August 2, 1882, this last-named company was not only created a Federal corporation in the Territories of Utah and Idaho, within which it theretofore had no corporate status, but it was also created a Federal corporation in the Territory of Wyoming, its original domicile, and after the passage of the act of August 2, 1882, it was a Federal corporation in all jurisdictions where it had any right to exercise corporate powers. The act of Congress was an explicit re-enactment of all the corporate rights, franchises and privileges of the Short Line Company as they then existed under the laws of the Territory of Wyoming; and after the passage of the Federal act the Territory of Wyoming lost all power, by way of amendment to existing legislation, or otherwise, of taking away from this Federal corporation any of its rights confirmed by the Congressional act. In other words, in determining the corporate character, rights, privileges, powers, and franchises of the Oregon Short Line Railway Company at any time after August 2, 1882, we are to look to the act of Congress and to the legislation of the Territory of Wyoming as it existed at said date, without regard to what subsequent changes the Legislature of Wyoming may have made in its laws. Those laws of Wyoming in effect on August 2, 1882, regardless of any subsequent action of the Territory of Wyoming, constitute the charter of the Short Line Company, not only in Wyoming, but in Utah and Idaho as well; not because they were the laws of the Territory of Wyoming, but because they were re-enacted and adopted in the act of the Congress of the United States which created the Short Line Company a Federal corporation in the three Territories.

Those laws of Wyoming, so adopted by Congress, are the laws under which authority is found for the consolidation which resulted in the formation of the consolidated company, the plaintiff in error in this case. Such a consolidation could not become effective in Idaho and Utah because of any power conferred by the statutes of the Territory of Wyoming, but the authority for such consolidation of the Federal corporation, created under act of Congress in all three Territories, rests alone upon the Congressional adoption of the statutes of Wyoming in force at the time of the passage of the Congressional act.

Suppose the Territory of Wyoming previous to the consolidation had repealed the general act of its legislature authorizing consolidations between railway companies. Such repeal would not have taken away the power from the Oregon Short Line Railway Company to consolidate, because at the time of the Congressional act above cited the Short Line Company possessed the power to consolidate under its Wyoming charter, and as the result of the Congressional action Federal authority was conferred upon it to consolidate not only within the Territory of Wyoming, but within the Territories of Utah and Idaho as well.

Suppose, again, that the old Wyoming act authorizing consolidations had been amended prior to the consolidation which resulted in the creation of the plaintiff in error, and had prescribed a new method of consolidation, which of the two methods, the old or the new, must the Oregon Short Line Railway Company follow in order to legally effect the consolidation?

Suppose, again, that at the time of the passage of the Congressional act of August 2, 1882, there had been no statute of the Territory of Wyoming authorizing a consolidation. Could the Territory of Wyoming by any law thereafter enacted, have conferred such power upon the

enlarged Federal corporation created by act of Congress in the Territories of Wyoming, Utah and Idaho? Certainly not. It follows, therefore, irresistibly, that in order to determine as to whether or not the Short Line Railway Company had power to enter into a consolidation which resulted in the creation of the plaintiff in error, reference must be had to the acts of the Congress of the United States and to the powers therein conferred upon the Short Line Company. The power of consolidation, therefore, is necessarily derived from the act of Congress of the United States.

All of the above reasoning applies with equal force to the Utah and Northern Railway Company. As each of the constituents of a consolidated corporation must find the power in its own charter to enter into the consolidation, it follows that the consolidated corporation is created by the action of each of the sovereignties by which its constituents were created. This is the underlying principle in Nassau and Lowell Railway Company, corporation, *v.* Lowell and Boston Railroad Company, corporation (136 U. S., 356), and similar cases.

If the right of consolidation, or if any of the corporate powers of the plaintiff in error depend upon the legislation of Congress, and can not be wholly determined without reference to and construction of the laws of the United States, then the cause must be one arising under the laws of the United States.

We do not propose to discuss a proposition of law which has been finally settled by decision of this court in the Pacific Railroad removal cases. The proposition therein laid down (115 U. S., 11), is so clear and explicit, that it must stand for all time to come as expressing the

true meaning and intent of Congress that all such suits do arise under the laws of the United States.

We believe the decision in the Pacific removal cases is conclusive in this case. The Kansas Pacific Railway Company and the Denver Pacific Railway and Telegraph Company were both State or Territorial corporations; undoubtedly they derived their power to consolidate with the Union Pacific Railroad Company by virtue of Congressional legislation, but the extent to which Congressional legislation figured seems not to have been considered as material. The suit as to those companies arose under the laws of the United States because part, at least, of the powers and capacities of the consolidated company were derived from Congressional acts. As so ably expressed by the court:

"It is impracticable, so far as the operations and transactions of the company are concerned, to disentangle those qualities and capacities which have their source and foundation in those acts (Congressional acts), from those which are derived from State or Territorial authority."

We note that the court seems to state a distinction between the consolidated corporation, the Union Pacific Railway Company, in its operations in Kansas and the same company in its operations in Nebraska; but it seems to be held that such distinction is immaterial. We believe the common statement of the principle established by the Pacific removal cases, is not only that a cause of action against a corporation existing solely under act of Congress is one arising under a law of the United States, but that any action against a corporation whose existence can only be established and whose powers and corresponding liabilities can only be determined by an examination of an act of Congress, also arises under the laws of the United States, and the right of removal exists. It is not necessary to such right of removal that the corporation seeking it should derive all its powers or receive

all its life from act of Congress, but only that some substantial part of its corporate existence, as distinguished from a mere collateral franchise, should be so derived. We therefore submit that the petition for removal should have been allowed, and that the judgment of the court below should be reversed, with proper directions as to further procedure.

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Attorneys for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1895.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

THE OREGON SHORT LINE AND UTAH NORTHERN RAILWAY COMPANY, *Plaintiff in Error*, *vs.* JANE SKOTTOWE, *Defendant in Error.*	No. 147.
THE OREGON SHORT LINE AND UTAH NORTHERN RAILWAY COMPANY, *Plaintiff in Error*, *vs.* JAMES T. MULLON, *Defendant in Error.*	No. 148.
THE OREGON SHORT LINE AND UTAH NORTHERN RAILWAY COMPANY, *Plaintiff in Error*, *vs.* FRANCIS CONLON, *Defendant in Error.*	No. 229.

The only question in these cases is whether or not the State circuit court erred in refusing the application of plaintiff in error for their removal to the Federal circuit court.

The material facts as they appear from the petition for the removal of the cause and from the laws referred to therein are as follows:

The Oregon Short Line and Utah Northern Railway Company is the result of the consolidation of certain minor corporations, including, amongst others, the Oregon Short Line Railway Company and the Utah Northern Railway

Company. The Oregon Short Line Railway Company was a corporation created and organized under the territorial laws of the Territory of Wyoming. After it was fully organized Congress passed the act of August 2, 1882. That act, so far as it is material for the purposes of this case, is as follows:

"That the Oregon Short Line Railway Company, *a corporation of that name duly incorporated and organized under the laws of the Territory of Wyoming*, the amended articles of incorporation of which were duly filed in the office of the secretary of said Territory on the twelfth day of July, A. D. 1881, be, and the same hereby is, made a railway corporation in the Territories of Utah, Idaho, and Wyoming, under the same conditions and limitations and with the same rights and privileges that it now has and enjoys under said articles of incorporation within the said Territory of Wyoming."

The Utah Northern Railway Company was created and organized under the territorial laws of the Territory of Utah, and afterwards a similar enactment, in almost the same language as the one hereinbefore set forth in relation to the Oregon Short Line Railroad Company, was passed by Congress.

The defendants in error do not question the doctrine of Osborn *vs.* The Bank of the United States (9 Wheaton, 817), that where a corporation *is created by an act of Congress, and has no existence independent of that act*, that the act of Congress is necessarily involved in every suit by or against such a corporation.

Nor is it questioned that this doctrine, as announced in the Pacific Removal cases, extends to consolidated corporations where all or any one of the constituent corporations are so created.

But the claim of the defendants in error is, that as these corporations were organized and had an existence entirely independent of the act of Congress, and could sue or be sued without reference to these acts and entirely independent thereof, that the doctrine of Osborne *vs.* The Bank does not apply.

It will be seen that this was the doctrine upon which these cases were decided in the State court, by reference to the opinion of the Supreme Court in the case of Conlon *vs.* The Oregon Short Line Railway Company upon the first appeal. This opinion is reported in the 21st of Oregon, at page 462. It is the first of these cases in which the same question was involved. The case was then reversed upon other grounds, and sent back to the circuit court for another trial, and it is to the judgment of the State court on the *second* appeal that this writ of error is taken. Bean, J., delivering the opinion of the State court, says:

"It may be taken as settled beyond controversy that corporations of the United States created by and organized under acts of Congress are entitled as such to remove into the circuit courts of the United States suits brought against them in the State courts under and by virtue of the act of March 3, 1887, on the ground that such suits are suits arising under the laws of the United States. (Pacific Railroad Removal cases, 115 U. S., 2.)

"But was the defendant or any of its constituent corporations created by or organized under acts of Congress? We think not. By the act of August 2, 1882 (22 Stat. at Large, 1885), it is provided that the Oregon Short Line Railway Company, a corporation of that name, duly incorporated and organized under the laws of the Territory of Wyoming, the amended articles of incorporation of which were duly filed in the office of the secretary of said Territory on the 12th day of July, 1881, be, and the same is hereby, made a railway corporation in the Territories of Utah, Idaho, and Wyoming, under the same conditions and limitations, and with the same rights and privileges that it now has and enjoys under said articles of incorporation within the Territory of Wyoming, and with

all the rights and privileges within said Territories of Wyoming, Utah, and Idaho which are secured to railway companies by the act of Congress approved March 3, 1875, entitled 'An act granting to railroads the right of way through the public lands of the United States,' and by the act of June 20, 1878 (20 Stat. at Large, 241), the Utah and Northern Railway Company, a corporation organized under the laws of the Territory of Utah, 'is hereby made a railway corporation in the Territories of Utah, Idaho, and Montana, under the same conditions and limitations and with the same rights and privileges that it now has and enjoys under its articles of incorporation.'

"A glance at these acts of Congress is sufficient to show that neither of the corporations named therein was organized or created under or pursuant to any law of the United States, but they are territorial corporations, to which Congress has granted certain rights and privileges. They do not derive their existence or exercise their corporate powers, functions, or duties by virtue of the acts of Congress, but under the provisions of the laws of the Territories in which they were respectively organized. They were as much territorial corporations after as before the acts of Congress, only with the added privilege of exercising their corporate powers and functions within certain other Territories over which Congress has jurisdiction."

Judge Deady, of the United States district court for the district of Oregon, had already remanded the cases of Knahtla, Carlson, and Schroeder against The Oregon Short Line and Utah Northern Railway Company upon the same ground, that these corporations were not "*created by or organized under*" any act of Congress. These decisions of Judge Deady have never been reported, but they are alluded to by Judge Bean in the opinion referred to, and also in the opinion in the case of Knahtla *vs.* The Oregon Short Line Railway Company, 21 Or., 140. All of these cases grew out of the same accident as the Conlon case, and the petitions for removal are substantially identical with the petitions in all the cases now under consideration.

The doctrine of Osborne *vs.* The Bank and the Pacific Removal cases, that a suit for or against a corporation created by and organized under an act of Congress always involves a Federal question, rests upon the proposition, as was said by Chief Justice Marshall in the Osborne case, that—.

"The charter of incorporation not only creates it, but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on its contracts, is given and measured by its charter, and that charter is the law of the United States. The bank can acquire no right, make no contract, bring no suit which is not authorized by a law of the United States. It is not only itself the mere creature of law, but all its actions and all its rights are dependent upon some law. Can it, then, thus constituted, have a case which does not arise literally as well as substantially under the law?"

Now, this reasoning does not apply to a case like the one at bar, where the corporation sued has an existence prior to and entirely independent of the act of Congress—where it could go into the courts and sue if that act never had been passed—where the act in question does not in any manner provide for its organization nor for any rights or privileges which can in any way become important in this case.

Here there was certainly no *creation* of a corporation. It is legally as well as physically impossible to create a thing in any true sense which already has a complete existence in identically the same form. If the corporation was made a Federal corporation in any sense, which is extremely doubtful, it was certainly more like the process of *adoption* than one of *creation*.

In that case the proceeding and effect would be exactly analogous to the naturalizing of an alien and thereby making him a citizen of the United States. No one has ever claimed that merely because such a citizen took his citizenship, or

became, as it were, a "Federal citizen" by virtue of the law of the United States, that therefore that law would always be in question in any litigation to which he was a party, and give him a right of removal to the Federal courts.

This distinction is clearly recognized by Chief Justice Marshall in Osborne *vs.* The Bank, referred to in the following language:

"It is said that a clear distinction exists between the party and the cause; that the party may originate under a law with which the cause has no connection, and that Congress may, with the same propriety, give a naturalized citizen, who is the mere creature of a law, a right to sue in the courts of the United States, as give that right to the bank.

"This distinction is not denied, and *if the act of Congress was a simple act of incorporation and contained nothing more*, it might be entitled to great consideration. But the act does not stop with incorporating the bank; it proceeds to bestow upon the being it has made all the faculties and capacities which that being possesses. Every act of the bank grows out of this law and is tested by it. To use the language of the Constitution, every act of the bank arises out of this law."

So that it will be seen at once that the doctrine of these cases does not apply to the case now under consideration. Here the acts not only stop with incorporating the companies in question, but they do not really go so far as that. They do not really incorporate them at all. They do not provide in any way for the organization of the railroad company; do not provide who shall be its incorporators, or upon what plan they shall be brought together as a corporation. It does not provide how much stock shall be issued. It does not provide what shall constitute the offices, nor how the officers shall be elected or provided. It simply leaves all these things exactly as it finds them.

It is exactly the same thing as if the Government should

say to some individual human being already existing and breathing the breath of life, "that by these enactments you, John Jones, are created a man, with all the rights and privileges that you now have as a man."

It is exactly the same, again, as though Congress should say to any well-established railroad corporation existing under State laws, as, for instance, the New York and Hudson River Railroad Company, the Illinois Central, or the Baltimore and Ohio Railroad Company, all of which, as I understand it, have complete existence under such laws, that this corporation "is made a corporation in the same form that it now is, with all the rights that it now has."

Could any one reasonably claim that such a corporation would thereby be brought within the rule of Osborne *vs.* The Bank, or the Pacific Removal cases? It seems to me not.

The Pacific Removal cases are placed exactly upon the same ground as the case of Osborne *vs.* The Bank, and Mr. Justice Bradley, delivering the opinion of the Court, says:

"An examination of these acts of Congress shows that the corporations now before us not only derived their existence, but their powers, their functions, their duties, and a large portion of their resources, from these acts."

It is submitted, therefore, that Osborne *vs.* The Bank and the Pacific Removal cases are not authority for the removal of a case of this kind.

Here the acts of Congress do not organize or create the corporations in any true sense, neither do they confer upon them any rights or privileges which are shown to in any way come in question in this cause.

Even if these corporations are in some sense "Federal corporations," it certainly cannot be contended for a moment that that fact alone would give them a right to sue in the Federal courts.

There is no authority of law for the removal of a cause simply because one party to it is a "Federal corporation."

Pacific Removal cases, 115 U. S., 1.

If such a corporation can remove at all, it is because "*its very existence depends upon the act of Congress, and therefore necessarily involves that act in any litigation to which it is a party*," and it is not because of the mere "Federal character" of the body corporate.

It is claimed in the brief of plaintiff in error that—

"If the right of consolidation, or if any of the corporate powers of a railroad corporation depend upon the legislation of Congress, that the right of removal exists."

We might, it seems, safely rest the case of the defendants in error upon this proposition, for, as will presently be shown, it is not made to appear in this cause that either the right to consolidate or any power of the corporation depended in any way upon the act of Congress.

But it is submitted that the proposition is not the law as laid down in Osborne *vs.* The Bank and the Pacific Removal cases. On the contrary, it is a violent and, it is submitted, an illogical enlargement of that doctrine.

We contend that the doctrine of these cases stand as the outpost of the law in that direction, and that the doctrine ought not to be enlarged or extended further.

In every one of the Pacific Removal cases it was made to appear that some constituent element of the consolidated corporations *depended for its very existence* on the Federal enactment.

It was upon this ground that the decision was rendered.

Mr. Justice Bradley says in the opinion as to the Union Pacific cases:

"One of said companies, to wit, the Union Pacific Railroad Company, was originally incorporated and organized under said acts, and was strictly a corporation of the United States, subject to the acts of Congress and having important duties to perform to the Government in the prosecution of its business. The facts that the last-named company *is one of the constituent elements* of the consolidated company, and that the entire system of roads now in its possession and under its charge and control constitutes one of the most comprehensive and important mediums of interstate commerce in the country, and that in all its transactions it is subject to the supervision and control of the Government of the United States, are sufficient, it seems to us, to bring the Kansas cases, as well as the other cases, fairly within the principle of the case of Osborne *vs.* The Bank."

It is clear that it was not intended in those cases to extend the rule beyond Osborne *vs.* The Bank, and in the latter case, as we have seen, Chief Justice Marshall put the decision not upon the ground that *some* corporate power depends upon the act of Congress, nor even upon the sole ground that the corporation is created by such an act, but upon the narrower ground that it not only depended upon the Federal law for its very existence, but that *every* power which it possessed depended *solely and entirely thereon*, and that therefore the Federal law was *necessarily* involved in

any suit to which it was a party, and, replying to the argument that there is a clear distinction between the "*party*" and the "*cause*," he says:

"This distinction is not denied, and if the act was a *simple act of incorporation* and contained nothing more, it might be entitled to great consideration; but the act does not stop with incorporating the bank. It proceeds to bestow upon the being it has made *all the faculties and capabilities which that being possesses.*"

So that it may be seen that it is not enough that *some power* of the corporation depends upon an act of Congress to bring the case within the rule of that decision, or even that the right *to* consolidate was based thereon. On the contrary, in order to come fairly within the doctrine of that case, it must either appear that it so depended upon the act of Congress *that it would not exist or have the power to sue or be sued* independent of the act, so that it *necessarily* follows that the act *must* be the basis of the controversy; or if the corporation only depends upon Congress for a portion of its powers or for some particular franchise, it must be made to appear that that particular power or franchise will become in some way material to the dispute, and that the controversy arises in some way, in whole or in part, out of or in relation to the grant of that particular franchise or power.

But it is submitted that it was not made to appear in the State court and is not made to appear *now*, in this Court, that either the right to consolidate or any other right or power of this corporation (unless it may be the right of way

across the public lands) depend in any way upon the act of Congress.

The argument on behalf of plaintiffs in error that the laws of Utah and Wyoming under which these corporations were organized were adopted into the acts of Congress referred to is somewhat farfetched and artificial. But suppose this argument is sound, still, in order to make this work the creation of a new corporation, it would be necessary to reorganize under the act of Congress as supplemented by the territorial laws. But the act of Congress does not provide for this, neither does it attempt to adopt the territorial provisions in relation to the manner of organization or as to the way in which that organization shall be perpetuated and made effectual by the election of officers, &c.

The act of Congress provides that it shall be under "the same conditions and limitations" and have "the same rights and privileges" as it has under its articles of incorporation, but it nowhere provides that it shall organize or elect its officers in the same way provided by the territorial laws. Indeed, there is not a word as to any organization, or even as to the perpetuation of any organization. Is it not obvious, then, that this was in no sense intended to be the creation of a new corporation, whose existence was to depend upon the Federal law, but rather the mere recognition of a corporation already existing, with a grant of a right of way and a Congressional sanction of its right to extend its sphere of operations into two other Territories?

What right, then, which is in any way in controversy in this case does this corporation derive from the act of Congress? It takes its right of way, it is true, under that act; but the learned and able attorneys for plaintiff in error will hardly claim that every corporation which takes a right of

way by Federal grant is thereby entitled to go into the Federal courts, whether that right of way is or is not, in controversy.

If this cause of action had arisen in some one of the Territories to which a Congressional sanction of the transaction of business had been extended, there might have been room for some argument, although, it is submitted, not an argument of very great strength even then, that the act of Congress was necessarily involved in the controversy, because it was by its authority that the corporation was doing business in these Territories; but in this case the corporation was not doing business in either of those Territories, but in the State of Oregon, where it had no Congressional authority or sanction for doing business at all.

The contention of counsel that prior to the act of Congress referred to the companies in question had no right to construct or operate railroads outside of the Territory in which they were created must be allowed only with considerable modification. Many State corporations are engaged in business in other States, and there are few, if any, States in which this is not permitted, either by direct enactment or State comity. Any foreign corporation can do business in the State of Oregon, where this cause of action arose.

But it is insisted that the power *to consolidate* depends upon this enactment.

It should be enough to say that this power *was in no way in controversy* in this action. The plaintiff alleged corpo-

rate existence. Defendant could not and did not seek to deny it. It made no difference, even, whether or not it was a "consolidation" or how it was organized. It was enough that it was a corporation *de facto*.

However, the acts of Congress in question do not say a word about consolidation. It is only by an indirect process of reasoning and by piling presumption on supposition that there is any attempt to connect this power with the acts in question.

The act does not in its terms appear to have any reference to the power of consolidation; but it "must be supposed" that the territorial laws and the articles of incorporation are embodied in and thereby made a part of the act of Congress.

It does not appear that either the *territorial laws* or the *articles of incorporation* had any provision in relation to this matter; but these corporations could not consolidate without authority, and therefore it "must be presumed" that they had such authority from the Territory.

Now, it is respectfully submitted that this reasoning is somewhat strained.

It does not necessarily follow from the consolidation of these corporations that they had *any* statutory authority therefor other than is inferred from their very existence as a corporation.

This power may very well be inherent in all corporations. At least this is so far true that the consolidated corporation may have a *de facto* existence which cannot be attacked in a proceeding of this kind. Pacific Removal cases, *supra*.

It is not necessary from our point of view to consider the question as to whether or not the territorial legislature could have revoked the charter of this company or repealed

On the contrary, the plaintiff saw fit to treat it as a *de facto* corporation or as existing under its original organization.

It was by the petition for removal that the State court was first notified that there was any claim that an act of Congress would come in controversy or be in any way involved.

It is submitted, therefore, that the case is clearly and squarely within the rule of Chappel *vs.* Waterworth.

Caples *vs.* Railway Co., 67 Fed., 9.

Indeed, it is hard to imagine a case in which the rule can be more fairly and justly applied than in this case.

In the first place, the rule established in Osborne *vs.* The Bank and the Pacific Removal cases, while well established and by us unquestioned, is based upon purely theoretical and technical grounds. It is difficult to reconcile that rule with that large number of decisions holding that there must be a *real controversy* between the parties as to the construction of some Federal enactment in order to give the Federal courts jurisdiction.

Carson *vs.* Dunham, 121 U. S., 421, 427.

Gold Washing Co. *vs.* Keyes, 96 U. S., 199.

Tenn. *vs.* Union Planters' Bank, 152 U. S., 460.

In a case like this it is obvious that there is no controversy between the parties as to their rights under any act of Congress.

It was not claimed by the plaintiff in error that the act of Congress gave it any rights which would cut any figure in the litigation, or that its liability or the extent thereof was in any way affected by such act.

There was no defense whatever pleaded or claimed under these enactments.

It never became important for the court to construe them. Indeed, it never became necessary to construe them at all upon the merits of the case.

To hold, as contended by counsel, that the right to remove a cause, where there was a real, genuine controversy over the construction of a Federal statute, was destroyed unless such Federal question was presented on the face of plaintiff's complaint, but that the right was preserved in a case like this, would be to say that Congress intended to preserve the shadow while abolishing the substance.

The argument in the brief of plaintiffs in error, by which it is sought to distinguish this case from Chappel *vs.* Waterworth and other decisions of this Court in the same line, is certainly ingenious, but it is submitted that it is not sound. Neither the premises nor the logic will bear close investigation.

In the first place; as to the effect which the application of the doctrine to these cases will have upon removal cases generally, it is urged that it will give to the plaintiff in every cause the right to choose the tribunal in which the litigation shall be pursued; but this was the very argument which was urged against the adoption of the rule in the cases cited and which was held to be insufficient.

In the case of Tennessee *vs.* The Planters' Bank Mr. Justice Harlan, dissenting, calls attention to this very argument.

"What reason," he says, "could there have been for denying to a defendant the right, by a removal of the suit, to invoke the jurisdiction of a circuit court of the United States for the protection of his rights under the Constitution or laws of the United States, while giving to the plaintiff the right to invoke the jurisdiction of the same court for the protection of similar rights?"

After the full consideration, which it may be safely assumed always results from a decision by a divided court, this argument was overruled, the majority of the Court holding that the language of the act was plain, that the well-understood purpose of Congress was to contract the Federal jurisdiction, and that the denial to the defendant of the right of removal, even where his *substantial defense* really did depend upon the construction of an act of Congress, could not injure him, since, "if he has pleaded and relied on such defense in the State court and that court has decided against him in regard to it, he can remove the case into this Court by writ of error and have the question he has raised decided here;" and this doctrine has been affirmed and reaffirmed in this Court, until the doctrine of *stare decisis* has applied, and it has been accepted by the entire Court without dissent.

Chappel *vs.* Waterworth; Postal Co. *vs.* Alabama, and East Lake Co. *vs.* Brown, *supra.*

The argument that this construction gives the plaintiff a right to choose his tribunal and enables him to shut the defendant out of the Federal courts in a case otherwise proper, cannot have any greater cogency in a case like this, where the act of Congress is only *theoretically* in controversy, than it has in a case where there is a *real substantial contention* over, and the whole case depends upon, the construction of such an act, as in East Lake Co. *vs.* Brown or Chappel *vs.* Waterworth.

Indeed, some of the strongest objections urged against the rule in the Tennessee case by Mr. Justice Harlan do not apply to a case of this kind, and there are many reasons for the rule here, that did not exist in any of those cases. For instance, the intention of Congress to contract the jurisdiction of the Federal courts is nowhere more strongly evidenced than it is in relation to this very class of cases by section 6 of the act, which entirely repeals section 640 of the Revised Statutes, which had authorized any suit commenced in a State court against any corporation other than a banking corporation, organized under the laws of the United States, to be removed into the United States courts upon the petition of the defendant stating that it had a defense arising under a law of the United States.

Here, as we have seen, it is obvious and plain to every one that there was no real controversy over any law of the United States (except, of course, as to the very right of removal itself). The attempt to remove the cause upon that ground was at best a mere pretext to get the case into the United States court for some other purpose entirely independent of any act of Congress, the construction of which would become important.

The very fact that a supposed "Federal question" could so often be made a pretext for the removal of causes in order to further some other and entirely distinct purpose may have been and probably was one of the reasons which influenced Congress to restrict and contract the right.

The State courts are ordinarily much more convenient tribunals and the ordinary litigant can try his cases therein with much less trouble and expense.

In Oregon, for instance, many of the people have to travel two or three hundred miles in order to reach a Federal court, whereas each has a State court at his own county-seat.

It can be readily seen that the trial of a hard-fought case in the United States court, where a party has to leave his business and travel such a distance with his witnesses, may mean actual bankruptcy and ruin to a man of moderate means.

All this was no doubt taken into consideration by Congress and led to the restriction of the right.

It is urged, however, on behalf of plaintiff in error, that if it would be necessary for the plaintiff *to prove* that an act of Congress was involved in any action in order to sustain his case, then the defendant may remove, *whether it is made to appear in the complaint or not.* But this is not the rule which has so often been announced by this Court.

The case cannot be removed, says the Court, through Mr. Justice Gray, in Postal Co. *vs.* State, unless the fact that the Federal question aries "*appears by the plaintiff's statement of his own claim.*"

Almost the same identical language was also used in the opinion in Chappel *vs.* Waterworth and again in the syllabi to East Lake Co. *vs.* Brown.

Is it not clear, then, that under the rule of these decisions if the plaintiff *can and does state his case without presenting a Federal question* the case cannot be removed?

But it is asked, Can a party prevent a removal by a *fraudulent misstatement of his case?* That question is not in this case. It is not necessary, therefore, to discuss what effect fraud might have. Here there was no misstatement whatever, fraudulent or otherwise.

The plaintiff finds this corporation organized, with a president, board of directors, etc., engaged in doing business as a corporation. He knows nothing and is neither required nor presumed to know anything of these special and private acts of Congress conferring certain powers upon the corporation.

We deny that it is incumbent upon the plaintiff in suing a corporation to plead the process by which it was created. On the contrary, he may rely upon its *de facto* existence and upon the natural presumption from such existence that it is duly organized.

It would be difficult, if not impossible, in the case of foreign corporations doing business in a State, for the plaintiff to ascertain just how the corporation was created. As a matter of fact, the corporation might not have a *de jure* existence at all. The books are full of cases where actions have been sustained against *de facto* corporations. Indeed, in the Pacific Removal cases cited by plaintiff in error Mr. Justice Bradley clearly announces the doctrine.

Certainly the plaintiff is not required to go further with his allegations than with his proof—allege and swear to the details of an organization of which he knows nothing and which may not, as a matter of fact, exist.

Take the cases under consideration. The plaintiff finds this corporation existing and doing business, with an apparent organization. Suppose he goes farther, and upon inquiry and examination (which we assert he was under no obligation to make) he ascertains that the corporation is a consolidation of six different railway companies, all of which companies were created by and organized under either the laws of Wyoming, Utah, or Nevada. Must he plead in detail the manner in which each one of these consolidated corporations was created, and then go still farther and ascer-

tain that Congress has also passed certain private acts, of which he knew nothing, granting certain additional rights or privileges to two of these corporations, and then go farther still and allege that these corporations *have accepted* these acts of Congress and claim rights thereunder—another matter of which he is utterly ignorant?

It is submitted, not. He has a right, on the contrary, to rely upon the *de facto* existence of the corporation, or, if it comes to his knowledge, upon its creation by or under the laws of some State or Territory. If, as a matter of fact, there is some *later act of Congress* granting it an extension of powers, or some other rights or privileges which the corporation deems important, *that is matter of defense* which the corporation must itself interpose.

In that case the Federal question "would not appear from plaintiff's own statement of his case," and the case would not be removable under the law as established by this Court.

It would not follow that there would be any "misstatement" or even a "defective" statement of his cause of action.

In a case like these, the *manner* of defendant's creation is entirely immaterial, so far as the merits of plaintiff's recovery are concerned, and plaintiff is under no obligation, either legal or moral, to plead facts or details otherwise immaterial, *simply to enable the defendant to remove the cause.*

It is not true, as contended on behalf of plaintiff in error, that the plaintiff must plead in all their details "every fact which he must prove in order to sustain his case." It is the *ultimate* facts, not the mere probative ones, which must be pleaded. Here the ultimate fact is the *existence of the corporation.* The allegation of this ultimate fact might be sustained by a variety of probative facts—by

proof of acts which characterize a corporation or by producing its charter or articles of incorporation with proof of organization thereunder.

But suppose it were true, as claimed, that every probative fact necessary to a recovery must be alleged, would that help the contention of the learned attorneys? Let us see. Suppose that the answer in this case had put in issue the allegation of corporate existence, and the plaintiff, to sustain it, should have offered appropriate proof, showing that it was doing the usual business of a corporation under a corporate name, and that it had a president, board of directors, and other corporate officers, will counsel contend that would not have been sufficient proof?

Or suppose plaintiff had gone still farther and proven the articles of incorporation under the laws of Wyoming, and the organization thereunder (all of which are conceded facts in this case), would that not have made a complete case for the plaintiff in this regard, and would not the defendant have been compelled to introduce the act of Congress and its acceptance *in defense*, if it claimed anything therefrom?

The allegation that the defendant corporation was "duly organized and authorized" is unimportant. It was, as we have seen, not a necessary allegation. Plaintiff could, if he saw fit, entirely abandon it and stand upon the *de facto* existence. Indeed, it would be presumptively established by such proof of *de facto* existence, or by proof of organization under territorial laws.

The proposition that this allegation presented and disclosed to the court in detail every step which had been taken in the organization of the company and every grant

of powers since that organization is indeed a novel proposition and one which is worthy of a necromancer.

This argument would hardly be made if the question came upon a demurrer to the complaint instead of a petition for removal.

The eminent attorneys for plaintiff in error cite the Court to the Union Pacific railway and ask whether, if it was sued upon a complaint like those at bar or upon a complaint alleging it to be a State corporation there would be a right of removal.

The illustration is not parallel in conditions, although it may seem so at the first blush.

The misleading feature of it lies in the wide notoriety which the Union Pacific railway and its organization has attained.

It may be that it would not be necessary at this date to plead the Federal character of that road, although when the case first came before the Court it was thought necessary to carefully plead not only the act of Congress, but its *acceptance* by the company.

If it would not be necessary now, it would be only because that company and the manner of its creation has become a matter of history and been so frequently before the courts that they would take judicial knowledge thereof, on the principal that the courts take knowledge of all matters of history and matters universally known within their jurisdiction. But it would be going a long way—further, it is submitted, than any court has ever yet gone—to require the courts of the State of Oregon or the courts of any other State to take judicial knowledge of certain private and special acts of Congress, granting special franchises and powers to two little local corporations in the Territories of Utah and Wyoming.

That courts did not take knowledge of such acts at common law is too elementary to admit of question, and under the local laws of Oregon the court would only take knowledge of such laws when pleaded.

Code of Oregon, sec. 88.

But even if the court should take judicial knowledge of the act of Congress, still how should it know *that it had been accepted* by the corporation?

In a case of this kind the grant of powers does not become in any way effective until it has been accepted.

St. Louis R. R. *vs.* Indianapolis R. R., 9 Bissell, 296, cited with approval in Nashua R. R. *vs.* Lowell R. R., 136 U. S., —.

So that even if the court assumed knowledge of the passage of this special act it would not have been made to appear in plaintiff's complaint that it took any rights thereunder unless its acceptance was pleaded.

Again, how was the court to know unless it appeared in the complaint that this was a consolidated company, or that either of the companies mentioned in the acts of Congress was one of its constituent elements.

Suppose that the plaintiff in the court below had gone into the United States court, in the first place, upon a complaint exactly like this, would any one claim for a moment that the jurisdiction of that court could be maintained upon such allegations?

And that, it is submitted, is the real test of the right of removal under the rule of this Court.

It is submitted, therefore, in conclusion upon this particular branch that however ingenious and able may be the argument in that direction, the attempt to distinguish this case from Chappel *vs.* Waterworth and other like cases decided by this Court must wholly fail.

The Petition for Removal Not Even Sufficient under the Law of 1875.

The petition for removal nowhere directly alleges an abandonment of the corporate existence under the territorial laws or an acceptance of the grants conferred by the acts of Congress.

This was necessary even under the old practice, since such acceptance must be shown.

St. Louis *vs.* Indianapolis R. R. Co., 9 Bissell, 296, *supra.*

And the allegation of facts showing a Federal question must be clear and explicit and not depend upon inference or conclusion of law.

Gold Washing Co. *vs.* Keyes, 96 U. S., 199.
Carson *vs.* Dunham, 121 U. S., 421.
Trafton *vs.* Nogues, 4 Sawyer, 178.

Respectfully submitted.

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